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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 138

KENTUCKY WHIP AND COLLAR COMPANY,
PETITIONER,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 26, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

KENTUCKY WHIP & COLLAR COMPANY, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Defendant

BILL IN EQUITY AND PETITION FOR A DECLARATION OF RIGHTS —Filed August 17, 1935

1

The plaintiff, Kentucky Whip & Collar Company, states that it is a corporation organized under the laws of the Commonwealth of Kentucky, and as such corporation it is a citizen of Kentucky, with its principal office and its place of residence at Eddyville, in the Western District of Kentucky, and as such corporation it is authorized to sue and be sued, contract and be contracted with, in its corporate name. Plaintiff is now and for many years past has been engaged in the manufacture at Eddyville, Kentucky, of horse collars and strap goods and in the marketing of such manufactured articles throughout the United States, and in the manufacture of said articles it now employs and for many years past has employed the labor of convicts confined in the Kentucky State Penitentiary at Eddyville, Kentucky.

2

The defendant, Illinois Central Railroad Company, is a corporation organized under the laws of the State of Illinois, and is a citizen of that State. As such corpora-
[fol. 2] tion it is authorized to and does engage in the business of a common carrier by rail, and as such common carrier it has a line of railroad to and through the town of Eddyville, in the Western District of Kentucky, and to and through other places in the Western District of Kentucky, with agents in charge of the defendant's business at each of such towns.

3

This is a suit in equity of a civil nature, arising under the Constitution and laws of the United States, as will be

hereinafter more fully set out, and it presents and involves an actual controversy between this plaintiff and the defendant, and the matter in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

4

Plaintiff states that in the conduct of its business it has built up a large and valuable trade for the products manufactured by it in practically all the States of the Union, and particularly in the States of Arizona, Illinois, Michigan, Nebraska, North Carolina, Kansas, Ohio, Texas, Virginia, Pennsylvania, Alabama, Iowa, Indiana, Georgia, Minnesota, Wisconsin, Louisiana, Mississippi, Missouri, Arkansas, Oklahoma, South Carolina, Tennessee, West Virginia and Maryland; and that said business, particularly the right to ship its articles in interstate commerce to the States hereinabove enumerated, is worth far in excess of $3,000.00. It states that the collars, strap goods and other articles manufactured by it, and sold and shipped in interstate commerce, are useful articles of commerce and are not in any particular whatever harmful to health, or to the peace, good order or general welfare of the communities into which they are shipped or in which they are used.

5

Heretofore the Congress of the United States passed, and on July 24, 1935, the President of the United States approved an act entitled: "An Act to prohibit the interstate transportation of prison-made products in certain cases," said Act being in words and figures as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assem-
[fol. 3] bled, That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands or District of the United States, or place non-contiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory,

Puerto Rico, Virgin Islands, or District of the United States or place non-contiguous but subject to the jurisdiction thereof, where said goods, wares and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place non-contiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

Sec. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

Sec. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

Sec. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district [fol. 4] in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act."

Plaintiff states that said Act is violative of the Constitution of the United States in the following particulars:

(a) It is not a valid exercise of the power conferred upon Congress by the Constitution of the United States by Clause 3 of Section 8 of Article 1 of the Constitution of the

United States to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, but on the contrary is an unconstitutional attempt on the part of Congress to prohibit, regulate and interfere with the purely local business of manufacturing and producing harmless articles of commerce.

(b) It is an unconstitutional attempt on the part of Congress to deal with matters reserved to the states and to the people by the Tenth Amendment to the Constitution of the United States.

(c) It is violative of the Fifth Amendment to the Constitution of the United States, in that it deprives the plaintiff of its property, including its right to do busness in interstate commerce, without due process of law.

(d) It is an unconstitutional attempt on the part of Congress to so exercise its power to regulate interstate commerce as to permit the respective States of the Union, under the protection of said Act, to prohibit and regulate interstate transactions between their inhabitants and the inhabitants of other States with reference to useful and harmless articles of commerce.

6

Plaintiff states that believing the said Act to be unconstitutional, it did, on August 13, 1935, in fulfillment of a bona fide order theretofore received, tender to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, one sack of leather horse collars manufactured at plaintiff's plant at Eddyville, Kentucky with prison labor and consigned to C. K. Sutherland at Ajo, in the State of Arizona, and requested said defendant company in consideration of its regularly published tariff charges, to accept said shipment for transportation to its [fol. 5] destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company, there was in force and effect in the State of Arizona a law of that State prohibiting the sale within the borders of that State of any goods or merchandise manufactured, produced or prepared wholly or in part by convicts or convict labor, other than by

convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Arizona, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the endorsement of the defendant's agent thereon, is filed herewith as part hereof, marked Exhibit "A."

7

Plaintiff states that on August 13, 1935, in fulfillment of a bona fide order theretofore received, it tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, four sacks of cloth horse collars, manufactured at the plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to H. E. Dusman at York, in the state of Pennsylvania and requested the said defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company, there was in force and effect in the State of Pennsylvania a law of that State, prohibiting the sale within the borders thereof of any goods or merchandise manufactured, produced or prepared wholly or in part by convicts or prisoners of other States, except convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Pennsylvania, wrongfully and in violation of this plaintiff's rights refused to accept said [fol. 6] shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "B."

8

On August 13, 1935, the plaintiff, in fulfillment of a bona fide order theretofore received, tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, two sacks of leather horse collars and one sack of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor, and consigned to Asheville Army Store, at Asheville, in the State of North Carolina, and requested said defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company there was in force and effect in the State of North Carolina a law of that State, prohibiting the sale within the borders thereof of any goods or merchandise, other than farm products, coal and chert, manufactured, produced or prepared wholly or in part by convicts or prisoners, except by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of North Carolina, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1934." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "C."

9

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, three sacks of cloth horse collars, [fol. 7] manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Kerth-Mangold Hardware Company at Anna, in the state of Illinois, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said ship-

ment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company there was in force and effect in the State of Illinois a law of that State, prohibiting the sale or the offering for sale within that State of any goods or merchandise, other than agricultural limestone produced in the penal and reformatory institutions of that State, manufactured, produced or prepared by convicts or prisoners of other States, other than by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Illinois, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "D."

10

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, two sacks of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Clyde C. Smith at Ashland, in the State of Ohio, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company there was in force and effect in the State of Ohio a law of that State, prohibiting the sale within the borders of that State of any goods or merchandise manufactured, produced or prepared wholly or in part by convicts or convict [fol. 8] labor of other States, other than by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the

Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Ohio, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and evidenced its refusal by endorsing on said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the endorsement of defendant's agent thereon, is filed herewith as part hereof, marked Exhibit "E."

11

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, two sacks of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to L. S. Crandall at Kingman, in the State of Kansas, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company there was in force and effect in the State of Kansas a law of that State prohibiting, with certain exceptions not here material, the sale within the borders of that State of any goods or merchandise manufactured, produced or prepared wholly or in part by convicts or convict labor, other than by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Kansas, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport the same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "F."

[fol. 9]

12

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, eight sacks of cloth horse collars and one box of harness, manufactured at the plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Arch C. Ellis at McKinney, in the state of Texas, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company there was in force and effect in the State of Texas a law of that State, prohibiting the sale within the borders thereof of goods and merchandise manufactured, prepared or produced by convicts or convict labor, other than by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Texas, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "G."

13

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, three sacks of cloth horse collars and one sack of leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Paul Hessler at Falls City, in the State of Nebraska and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill

of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant rail-
[fol. 10] road company, the plaintiff is informed there was in force and effect in the State of Nebraska a law of that State, prohibiting the sale therein of any goods or merchandise, other than farm supplies, machinery and equipment, manufactured, produced or prepared wholly or in part by convicts or convict labor, other than by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Nebraska, wrongfully and in violation of plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "H."

14

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant company at its station in Eddyville, Kentucky, two boxes of harness and eleven sacks of leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison lab : and consigned to Hill Hardware Corporation, at Amherst in the State of Virginia, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company plaintiff is informed and believes that there was in force and effect in the State of Virginia a law of that State, prohibiting the sale of prison or convict-made or produced goods or merchandise, unless made or produced in the State of Virginia; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Virginia, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and

to transport same, and evidenced its refusal by endorsing upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement [fol. 11] thereon, is filed herewith as part hereof, marked Exhibit "I."

15

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, two sacks of leather horse collars, manufactured at the plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to M. R. Odiorne at Eaton Rapids, in the State of Michigan, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company, the tariff is informed and therefore charges, there was in force and effect in the State of Michigan a law of that State, prohibiting the sale therein of any goods or merchandise, other than binder twine, rope and cordage, manufactured, produced or prepared wholly or in part by prison or convict labor; and by reason of this fact, the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Michigan, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and evidenced its refusal by endorsing upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the endorsement of defendant's agent thereon, is filed herewith as part hereof, marked Exhibit "J."

16

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to J. W.

Beam at Argos, in the State of Indiana, and requested said defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois [fol. 12] Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Indiana a law of that State, requiring all convict-made goods sold or exposed for sale in that State to be labeled "convict made"; but the merchandise contained in the shipment tendered by the plaintiff, as herein set out, was not so labeled, and because of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Indiana, wrongfully and in violation of plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement, is filed herewith as part hereof, marked Exhibit "K."

17

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to G. Ziegler at Rockwell, in the State of Iowa, and requested said defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the defendant company. At the time said shipment was tendered to the defendant company there was in force and effect in the State of Iowa a law which required each article of prison or convict-made or produced merchandise sold or exposed for sale therein to be plainly labeled so as to indicate that same was made by convict or prison labor; but the horse collars embraced in the tendered shipment were not so labeled, and by reason of this fact the defendant company,

conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Iowa, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and evidenced its refusal by endorsing upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress of July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "L."

[fol. 13] 18

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant at its station in Eddyville, Kentucky, five sacks of leather horse collars and three sacks of cloth horse collars, manufactured at the plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to H. C. Reinker Harness Company at Mount Horeb, in the State of Wisconsin, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Wisconsin a law of that State, requiring all convict and prison-made goods, other than those made in Wisconsin, to be plainly labeled with the words "convict made," together with a statement of the year in which same were made and the name of the prison where made; but the articles contained in the tendered shipment herein referred to were not so labeled, and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Wisconsin, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and evidenced its refusal by endorsing upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "M."

19

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of leather horse collars, manufactured at the plaintiff's plant in Eddyville, Kentucky, with prison labor and consigned to O. B. Carlson & Son at Appleton, in the State of Minnesota, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the defend-
[fol. 14] ant company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Minnesota a law of that State, requiring all convict or prison made or produced goods or merchandise brought into that state and exposed for sale to be labeled with the words "prison made," together with a statement of the year of manufacture or production and the prison at which same were made or produced; but the horse collars embraced in the tendered shipment herein referred to were not so labeled, and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the state of Minnesota, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and evidenced its refusal by endorsing upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "N."

20

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant at its station in Eddyville, Kentucky, one sack of cloth and leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to E. L. Chalker at Mitchell, in the State of Georgia, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the de-

fendant company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Georgia a law of that State, requiring all convict made goods exposed for sale in that State to be plainly labeled so as to indicate that they were convict made; but the shipment of collars referred to herein were not so labeled, and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Georgia, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorse-
[fol. 15] ment thereon, is filed herewith as part hereof, marked Exhibit "O."

21

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Charleston Hardware Company at Charleston, in the State of West Virginia, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of West Virginia no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935, and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal,

endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "P."

22

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, one sack of leather horse collars and one box of harness, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Summers Hardware Company at Johnson City, in the State of Tennessee, and requested the defendant, in consideration of its regularly published tariff [fol. 16] charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Tennessee no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935, and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "Q."

23

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, six sacks of leather horse collars, manufactured at plaintiff's plant at Eddyville,

Kentucky, with prison labor and consigned to P. F. West at Eutawville, in the State of South Carolina, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of South Carolina no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and be [fol. 17] cause of this fact the defendant, wrongfully a in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words; "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "R."

24

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of leather horse collars and one box of harness, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to L. Levy & Son at Natchitoches, in the State of Louisiana, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Louisiana no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale

or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "S."

25

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of cloth horse [fol. 18] collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to R. B. True at Newbern, in the State of Alabama, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Alabama no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because

prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "T."

26

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to G. M. Giffee at Platte City, in the State of Missouri, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Missouri no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said [fol. 19] goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "U."

27

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, one sack of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Hubbard Hardware Company at Blytheville, in the State of Arkansas, and requested the defendant, in consideration

of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Arkansas no law in any wise restricting the shipment of convict made goods from other States into that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of this refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "V."

[fol. 20] 28

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, one sack of cloth horse collars, manufactured at plaintiff's plant in Eddyville, Kentucky, with prison labor and consigned to Western Hardware Corporation at Muskogee, in the State of Oklahoma, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Oklahoma no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to

was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "W."

29

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Galloway James Company at Baltimore, in the State of Maryland, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in [fol. 21] force and effect in the State of Maryland no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "X."

30

An August 13, 1935, in fulfillment of a bona fide order there-fore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, three sacks of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Mrs. M. N. Casron at Lake, in the State of Mississippi, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Mississippi no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because pro-
[fol. 22] hibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "Y."

31

Plaintiff states that not only has the defendant refused to accept and transport the specific shipments hereinbefore enumerated, but it is and will be the policy of the defendant company to refuse any shipments from this plaintiff of its prison made articles, where to accept and transport such shipments would violate the terms of said unconstitutional Act of July 24, 1935; that the refusal of the defendant to accept the shipments hereinbefore set out has materially damaged this plaintiff in its business, and the refusal of

the defendant to accept other similar shipments will operate to practically destroy plaintiff's business, which is largely of an interstate character; that the plaintiff has been damaged by the refusal of the defendant to accept each of the shipments hereinbefore enumerated, and will be likewise damaged by its refusal to accept any shipments hereafter tendered to defendant and refused by it, but to recover damages on account of such refusals would require a multiplicity of suits, and the right of this plaintiff to recover damages in one suit at law on account of damages resulting to it from the practical destruction of its business is so uncertain, and the difficulty of proving the extent of such damages is so great, that plaintiff has no adequate remedy at law and it is only in a court of equity that this plaintiff can be adequately protected and secured in its right to conduct its interstate commerce business in the useful and harmless articles manufactured by it.

Wherefore, plaintiff prays that the defendant be mandatorily enjoined and required to accept and transport each of the twenty-five shipments herein specifically set out, if and when re-tendered to it at its station in Eddyville, Kentucky, and enjoined and restrained from refusing to accept such shipments; that it be mandatorily enjoined and required to accept all future shipments of a similar character which may be tendered to it at its station in Eddyville, Kentucky, by this plaintiff, and enjoined and restrained from refusing to so accept same.

It further prays for a binding declaration of rights between this plaintiff and the defendant, decreeing and adjudging the Act of July 24, 1935, herein referred to, as violative of the Constitution of the United States, and par-
[fol. 23] ticularly adjudging and decreeing: (a) that said Act is not a valid exercise of the power conferred upon Congress by the Constitution of the United States to regulate commerce with foreign nations, among the several States, and with the Indian tribes, but on the contrary is an unconstitutional attempt upon the part of Congress to prohibit, regulate and interfere with the purely local business of manufacturing and producing useful and harmless articles of commerce; (b) that said Act is an unconstitutional attempt on the part of Congress to deal with matters reserved to the States and to the people by the Tenth Amendment to the Constitution of the United States; (c) that said Act is violative of the Fifth Amendment to the

Constitution of the United States, in that it deprives the plaintiff of its property, including its right to do business in interstate commerce, without due process of law; (d) that said Act is an unconstitutional attempt on the part of Congress to so exercise its power to regulate interstate commerce as to permit the respective States of the Union, under the protection of said Act, to prohibit and regulate interstate transactions between their inhabitants and the inhabitants of other States with reference to useful and harmless articles of commerce; and that pursuant to such declaration of rights the defendant be forever enjoined and restrained from observing or applying said unconstitutional Act with reference to shipments of the merchandise of the plaintiff of the character herein set out, when tendered by plaintiff to defendant for transportation in interstate commerce. It prays for its cost and all other equitable relief to which it may be entitled.

Kentucky Whip & Collar Company, by Chas. I. Dawson, Attorney. Woodward, Dawson & Hobson, Attorneys.

Duly sworn to by R. S. Mason. Jurat omitted in printing.

[fol. 24] IN UNITED STATES DISTRICT COURT

MOTION FOR INJUNCTION—Filed August 24, 1935

Plaintiff moves the Court for a permanent injunction as prayed for in the bill.

The plaintiff further moves the Court for a declaration of rights between the plaintiff and the defendant, as prayed for in the bill.

Kentucky Whip and Collar Company, by Woodward, Dawson & Hobson, Attorneys.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed August 24, 1935

Defendant, Illinois Central Railroad Company, moves the Court to dismiss the bill of complaint and petition for a declaration of rights upon the following grounds:

(1) The bill of complaint sets forth no facts which, if true, would entitle the plaintiff to the relief for which it prays, or to any of such relief.

(2) The Declaratory Judgment Act was not intended to be used as a means for obtaining injunctive relief.

(3) This proceeding is not authorized by the provisions of the Declaratory Judgment Act, and cannot be maintained.

(4) The Act of Congress approved July 24, 1925, relative to the transportation of prison-made goods in certain cases is constitutional and affords no basis for the relief prayed for by plaintiff.

(5) The bill of complaint on its face shows a lack of equity.

Trabue, Doolan, Helm & Helm, Counsel for Defendant.

Have seen and no objection to substituting this for original motion and giving it the original filing date, the original to be withdrawn from the record.

Woodward, Dawson & Hobson.

[fol. 25] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO SUBMISSION—Filed August 24, 1935

The plaintiff, Kentucky Whip and Collar Company, by Woodward, Dawson and Hobson, its counsel, and the defendant, Illinois Central Railroad Company, by its counsel, Trabue, Doolan, Helm and Helm, agree that this cause may be finally submitted to the Court upon the bill, plaintiff's motion for final decree granting it an injunction as prayed for in the bill, and for final and binding declaration of rights, as prayed for in the bill, and upon the defendant's motion to dismiss the bill.

Woodward, Dawson & Hobson, Attorneys for Plaintiff. Trabue, Doolan, Helm & Helm, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

MOTION FOR THE UNITED STATES OF AMERICA TO BE ALLOWED TO APPEAR AS AMICUS CURIAE—Filed August 24, 1935

Comes the United States of America by counsel, Bunk Gardner, United States Attorney in and for the Western District of Kentucky, and moves the Court that it be allowed to appear as amicus curiae herein.

Bunk Gardner, United States Attorney.

August 24, 1935.

[fol. 26] IN UNITED STATES DISTRICT COURT

PRELIMINARY INJUNCTION—Filed August 26, 1935

This cause having been submitted to the court for final decree upon the verified bill, the motion of the plaintiff for an injunction and a declaration of rights in accordance with the prayer of the bill, and the defendant's motion to dismiss the bill; and the court being satisfied that there is substantial doubt as to the constitutionality of the Act of Congress of July 24, 1935, attacked in the bill, and it appearing that the plaintiff's business will be materially injured by defendant's refusal, during the time this cause is being considered by the court, to accept shipments of the character of those specifically set out in the bill and tendered to it under the circumstances mentioned in the bill, and that plaintiff has no adequate remedy at law to protect it against such present and threatened injury;—

Now, in order to protect plaintiff against such injury, while this cause is being considered by the court, It Is Ordered, Adjudged and Decreed by the court that pending the further order of this court the defendant, Illinois Central Railroad Company, is enjoined and commanded, if, as and when same are again tendered to it by the plaintiff, to accept for transportation to the consignee each and all of the twenty-five specific shipments set out in the bill, said shipments being as follows: One sack of leather horse collars consigned to C. K. Sutherland at Ajo, Arizona; four sacks of cloth horse collars consigned to H. E. Dusman at York, Pennsylvania; two sacks of leather horse collars and one sack of cloth horse collars consigned to Asheville Army

Store at Asheville, North Carolina; three sacks of cloth horse collars consigned to Kerth-Mangold Hardware Company at Anna, Illinois; two sacks of cloth horse collars consigned to Clyde C. Smith at Ashland, Ohio; two sacks of cloth horse collars consigned to L. S. Crandall at Kingman, Kansas; eight sacks of cloth horse collars and one box of harness consigned to Arch C. Ellis at McKinney, Texas; three sacks of cloth horse collars and one sack of leather horse collars consigned to Paul Hessler at Falls City, Nebraska; two boxes of harness and eleven sacks of leather horse collars consigned to Hill Hardware Corporation at Amhurst, Virginia; two sacks of leather horse collars consigned to M. R. Odiorne at Eaton Rapids, Michigan; two sacks of cloth horse collars consigned to J. W. Beam at Argos, Indiana; two sacks of leather horse collars consigned to G. Ziegler at Rockwell, Iowa; five sacks of leather horse collars and three sacks of cloth horse collars con- [fol. 27] signed to H. C. Reinker Harness Company at Mount Horeb, Wisconsin; two sacks of leather horse collars consigned to O. B. Carlson & Son at Appleton, Minnesota; one sack of cloth and leather horse collars consigned to E. L. Chalkler at Mitchell, Georgia; two sacks of cloth horse collars consigned to Charleston Hardware Company at Charleston, West Virginia; one sack of leather horse collars and one box of harness consigned to Summers Hardware Company at Johnson City, Tennessee; six sacks of leather horse collars consigned to P. F. West at Eutawville, South Carolina; two sacks of leather horse collars and one box of harness consigned to L. Levi & Son at Natchitoches, Louisiana; two sacks of cloth horse collars consigned to R. B. True at Newbern, Alabama; two sacks of leather horse collars consigned to G. M. Giffee at Platte City, Missouri; one sack of cloth horse collars consigned to Hubbard Hardware Company at Blytheville, Arkansas; one sack of cloth horse collars consigned to Western Hardware Corporation at Muscogee, Oklahoma; two sacks of leather horse collars consigned to Galloway James Company at Baltimore, Maryland; three sacks of cloth horse collars consigned to Mrs. M. N. Casron at Lake, Mississippi.

It Is Further Ordered and Decreed that pending further order of this court the defendant, Illinois Central Railroad Company, is enjoined and restrained from refusing to accept for transportation and delivery to the consignee in other States other and similar shipments when tendered

by the plaintiff to the defendant at its station in Eddyville, Kentucky.

This order is condit oned upon the plaintiff executing to the defendant a bond in the usual form, with surety to be approved by the court, in the sum of One Thousand Dollars ($1,000.00), and the plaintiff having tendered bond in said sum, with National Surety Corporation as surety, and same having been approved by the court, this order is now decreed to be in full force and effect.

The court takes this cause under advisement on final submission on the prayer of the plaintiff for a permanent injunction and for a binding declaration of rights, and on defendant's motion to dismiss the bill.

Elwood Hamilton, Judge.

August 26, 1935.

Have seen and service waived this Aug. 26, 1935.

Trabue, Doolan, Helm & Helm, Attys. for Defendant.

[fol. 28] IN UNITED STATES DISTRICT COURT

TRIAL ORDER—Entered August 24, 1935

This cause came on to be heard. Both sides appeared by counsel and announced ready.

The plaintiff by counsel tendered a motion for permanent injunction as prayed for in the Bill and also moved the Court for declaration of rights between the plaintiff and the defendant. Said motion is ordered to be filed.

Then Hon. Bunk Gardner, United States Attorney, tendered a motion asking that the United States of America be allowed to appear herein as amicus curiae. Said motion is ordered to be filed and the Court being advised, it is sustained and the United States of America, by its attorney or attorneys, may appear in this case as amicus curiae.

Counsel for the defendant tendered a motion to dismiss the Bill for various grounds set out in full in said motion. The motion to dismiss is ordered to be filed.

Then the parties tendered a stipulation signed by the respective counsel, Woodward, Dawson & Hobson for plaintiff and Trabue, Doolan, Helm & Helm for defendant, agreeing that the cause may be finally submitted on the bill, motion for injunction, motion for declaration of rights as

prayed for in the bill and upon defendant's motion to dismiss the bill.

The Court, having heard the argument of counsel, takes the case under advisement with leave to United States Attorney to file brief.

Elwood Hamilton, Judge.

August 24, 1935.

Copy. L. Phelps, Clerk.
No charge.

[fol. 29] IN UNITED STATES DISTRICT COURT

OPINION—Filed October 3, 1935.

On August 28, 1935, a preliminary mandatory injunction was issued in this action in accordance with the prayer of the petition, and since that date has been in full force and effect. The case is now finally submitted on the motion of the plaintiff for a perpetual injunction, and motion of the defendant to dismiss the bill.

The plaintiff, Kentucky Whip & Collar Company, is a corporation organized under the laws of the Commonwealth of Kentucky, with its principal place of business at Eddyville, Kentucky. It has been for many years and is now engaged in the business of manufacturing in the Kentucky State Penitentiary at Eddyville, Kentucky, with convict labor, horse collars and strap goods, and has marketed and sold its products throughout the States of the Union.

The defendant, Illinois Central Railroad Company, is a corporation incorporated under the laws of the State of Illinois, and is a citizen of that State. It is engaged in the business of a common carrier by rail and is the principal carrier of the plaintiff's products to its customers.

The amount involved in this action exceeds Three Thousand Dollars.

The plaintiff enjoyed a very large trade in several states of the Union. Its products are useful articles of commerce and are not in any particular harmful to the health, peace, or good order of the communities into which they are shipped.

The plaintiff, on August 13, 1935, tendered to the defendant, the Illinois Central Railroad, at its freight station at

Eddyville, Kentucky, without any brand or mark thereon, certain of its manufactured goods which had been produced in their entirety with prison labor under contract with the Commonwealth of Kentucky in its penitentiary at Eddyville, Kentucky. These articles had been previously sold to customers and consigned to them for shipment by the defendant to the States of Arizona and Pennsylvania, which states at the time the shipment was tendered, by their laws, prohibited the sale within their borders of goods or merchandise manufactured in whole or in part by convict labor anywhere, other than by convicts or prisoners on parole or probation; to the State of North Carolina, which state at the time the shipment was tendered, by its laws, prohibited the sale within its borders of any goods or merchandise, other than farm products, coal and chert, manufactured in whole or in part by convict labor anywhere, other than by [fol. 30] convicts or prisoners on parole or probation; to the State of Illinois, which state at the time the shipment was tendered, by its laws, prohibited the sale within its borders of goods, or merchandise, other than agricultural limestone produced in the penal and reformatory institutions of that state, manufactured in whole or in part by convict labor anywhere other than by convicts or prisoners on parole or probation; to the States of Ohio, Kansas and Texas, which states at the time the shipment was tendered, by their laws, prohibited the sale within their borders of goods or merchandise produced or prepared wholly or in part by convicts or convict labor of other states, other than by convicts or prisoners on parole or probation; to the State of Nebraska, which state at the time the shipment was tendered, by its laws, prohibited the sale of any convict-made or produced goods or merchandise, other than farm supplies, machinery and equipment, manufactured in whole or in part by convict labor anywhere, other than by convicts on parole or probation; to the State of Virginia, which State at the time the shipment was tendered, by its laws, prohibited the sale of any goods or merchandise convict-made, unless made or produced in the State of Virginia; to the State of Michigan, which state at the time the shipment was tendered, by its laws, prohibited the sale of any goods or merchandise other than binder twine, rope and cordage, manufactured in whole or in part by convict labor; to the State of Indiana, which state at the time the shipment was tendered, by its laws, required all convict-made goods sold

or exposed in that state to be labeled "convict-made"; to the State of Iowa, which state at the time the shipment was tendered, by its laws, required each article of prison or convict-made merchandise sold or exposed for sale to be plainly labeled to indicate same was made by convict or prison labor; to the State of Wisconsin, which state, at the time the shipment was tendered, by its laws, required all convict-made merchandise, other than those made in Wisconsin to be plainly labeled "convict-made," together with a statement of the year when made and the name of the prison where made; to the State of Minnesota, which state at the time the shipment was tendered, by its laws, required all convict made merchandise brought into that state and exposed for sale to be labeled "prison-made," together with a statement of the year of manufacture and the prison at which produced; to the State of Georgia, which state at the time the shipment was tendered, by its laws, required all [fol. 31] convict-made goods exposed for sale in that state to be plainly labeled so as to indicate they were convict-made; to the States of West Virginia, Tennessee, South Carolina, Louisiana, Alabama, Missouri, Arkansas, Oklahoma, Maryland, and Mississippi, which states at the time the shipment was tendered had no law in anywise restricting the shipment of convict made goods from other states or requiring them to be labeled so as to indicate that said goods were convict made.

Defendant refused to accept said shipments and to transport same, and upon the bills of lading endorsed the following words, "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said Act, which is entitled "An Act to Prohibit the Interstate Transportation of Prison-Made Products in Certain Cases," is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin

Islands, or District of the United States, or place non-contiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place non-contiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place non-contiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

Sec. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or [fol. 32] in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

Sec. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

Sec. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act."

Plaintiff prays for a binding declaration of rights between this plaintiff and defendant, decreeing and adjudging

the Act violative of the Constitution of the United States because (1) said Act is not a valid exercise of the power conferred upon Congress by the Constitution to regulate commerce with foreign nations, among the several states, but is an unconstitutional attempt by Congress to prohibit, regulate and interfere with the purely local business of manufacturing and producing useful and harmless articles of commerce; (2) said Act is an unconstitutional attempt on the part of Congress to deal with matters reserved to the States and the people by the Tenth Amendment to the Constitution of the United States; (3) that it is violative of the Fifth Amendment to the Constitution of the United States in that it deprives the plaintiff of its property, including the right to do business in interstate commerce, without due process of law; (4) that it is an unconstitutional attempt on the part of Congress to so exercise its power to regulate interstate commerce as to permit the [fol. 33] respective States of the Union, under the protection of said Act, to prohibit and regulate interstate transactions between their inhabitants and the inhabitants of other States with reference to useful and harmless articles of commerce.

Is the Act complained of a valid exercise of the power of Congress to regulate commerce among the several States? Constitution, Section 8 (3).

The Government of the United States can claim no powers not granted to it by the Constitution either expressly given or by necessary implication. The words used in the Constitution are to be taken in their natural and obvious sense and not in a sense unreasonably restricted or enlarged, and in considering the powers conferred on the central government by the States under this instrument, we must always keep in mind the objects and purposes for which the powers granted were conferred.

Disordered commerce among the States contributed largely to the fall of the original Confederacy. It was soon found, following the Revolution, that it was idle and visionary to suppose that while thirteen independent states possessed the exclusive power of regulating commerce there would be found any uniform system or harmony or cooperation for the general welfare.

The necessity of power being lodged in the central government to regulate commerce among the states was one

of the prime causes for the establishment of the Constitution. "It is a power vital to the prosperity of the Union and without it the Government would scarcely deserve the name of National Government and would soon sink into discredit and imbecility. It would stand as a mere shadow of sovereignty to mock our hopes and involve us in a common ruin." Story on the Constitution, Vol. 2, page 2.

This enumerated power of the Federal Government to regulate commerce among the several States has been the subject of endless discussion from the adoption of the Constitution to the present time. It has been used as both a shield and a sword. Industry enjoying the special privileges of Government has set it up as a breastwork of defense against dislodgement and others have used it to invade the rights of one group to their own advantage. Its beneficent purpose should never be disregarded by Courts in interpreting its meaning. It should be used only for promoting the general welfare and securing the blessings of liberty to ourselves and our posterity.

It is said by counsel for the plaintiff that the Act here involved contravenes the Constitution in that it is not a [fol. 34] proper regulation of commerce among the States, and for that reason the Court should strike it down. The overthrow by the Courts of an Act of Congress involves the gravest responsibility and should never be done except where the Congress has disregarded the plain or implied restraints of the Constitution. The use of the power to regulate commerce is not confined exclusively to the promotion of trade among the states. It can be used to promote the public welfare in every particular, which includes health, morals, public safety, peace and good order. It can also be used to prevent fraud, deceit and imposition in trade, sales and contracts relating to the disposition of manufactured goods.

New necessities, new evolutions of society into more complex conditions evoke the exercise of an old power in a new way. The control of new things does not require new power if the old power still exists.

Improved transportation and communication, rapid exchanges because of new inventions, have widened the scope and expedited the distribution of manufactured goods. No longer can the doctrine of laissez faire or the buyer beware

accord to our citizens the protection they deserve in the purchase of goods, food, or clothing.

If it would be of substantial benefit to the purchaser of manufactured products to know their place of origin and conditions under which manufactured, the Congress has the right to use the commerce clause of the Constitution to confer on them its benefits in the purchase and use of the products of trade.

Before the Act here in question was passed by the Congress twenty-two states of the Union had passed legislation either prohibiting or regulating the sale of convict-made goods.

The criminal code and the conduct of penitentiaries have in recent years undergone great changes. Punishment is yielding some of its rigors to reformation. Most penitentiaries are no longer dismal, unsanitary places of detention for the broken and moral defective, where idleness makes the bad worse. Convicts are no longer the pawns of outside contractors. Idleness of inmates is the dread of all prison superintendents. However, useful work may be found for the inmate at penal institutions under the modern system without using unskilled hands to manufacture and place on the market inferior goods.

Prisoners may be gainfully employed in building useful public institutions in the States. No better illustration of this fact can be found than in the Commonwealth of Ken-
[fol. 35] tucky. Its penal and charitable institutions are antiquated, unsanitary, crowded, expensive to operate and wholly inadequate for the purpose for which intended. The Commonwealth is blessed with abundant raw material for the erection of either stone or brick buildings. All of its institutions are now overcrowded, and every inmate capable of work could be used for the building of modern new institutions, which would be a blessing to our mental defectives and moral delinquents. Similar projects could be carried out by convicts in other States of the Union. There is no likelihood of deceit or fraud being practiced on the public by this type of work as is often the case where convict labor is used for the manufacture and sale of articles of trade.

It has been the practice in some instances of persons dealing in convict made goods to represent that the manu-

facturing was done in free institutions and by skilled labor. The Federal Trade Commission has found this to be an unfair trade practice. See the proceedings of that body in the matter of Commonwealth Manufacturing Company and Harry Dushoff, doing business under the trade names and styles of Harry Dushoff & Company, and Chicago Manufacturing Company, Docket No. 1367.

Usually the place of manufacture of an article is disclosed as a matter of advertising and good will; and so far as I know no producer of a product in general use and sale has sought to conceal the place of production. The fact that the plaintiff in the case at bar contends that his business would be destroyed if required to label his product is strongly persuasive that the buying public attaches great importance to the place of manufacture, and a regulation requiring labeling is not in conflict with the Constitution.

The framers of the Constitution never intended that the power lodged in the Congress to legislate should be subject to the control of the Judiciary if there was a basis for the Congressional action, no matter how slight in fact it might be. It is only necessary for me to decide in this case that there was a slight basis for the Act of Congress in requiring the labeling of the plaintiff's product when tendered for shipment in interstate commerce, and such a basis undoubtedly existed. Courts have many times sustained legislation essentially similar to the Act here in question.

In re Rahrer, 140 U. S. 545;

Adams, et al. v. Tanner, Attorney General of the State of Washington et al., 244 U. S. 590;

[fol. 36] Whitfield v. State of Ohio, 196 N. E. 164, 129 Ohio State 543. (See opinion of lower court, Court of Appeals, Cuyahoga County, State of Ohio, Eighth District, not reported);

Carey v. State of South Dakota, 250 U. S. 118;

Schellenberger v. Pennsylvania, 171 U. S. 1;

L. & N. R. R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70;

Hutchinson Ice Cream Co. et al. v. State of Iowa, 242 U. S. 153;

Hygrade Provision Co. Inc. et al. v. Sherman as Attorney General of the State of New York, et al., 266 U. S. 497;

Brazee v. People of the State of Michigan, 241 U. S. 340;
Powell v. Pennsylvania, 127 U. S. 678;
Miller v. Wilson, Sheriff of Riverside County, State of California, 236 U. S. 373;
Lottery Cases, 188 U. S. 321;
Hoke v. United States, 227 U. S. 306;
Ripolite Egg Co. v. United States, 220 U. S. 45;
Weeks v. United States, 245 U. S. 618;
Webster v. Freed, 239 U. S. 233;
Rupert v. United States, 181 F. 87;
Lacost v. Department of Conservation, 263 U. S. 545;
Missouri v. Holland, 252 U. S. 415;
Detweiller v. Welch, 46 F. (2) 71;
State of Wyoming v. W. S. Buch Mercantile Co. et al., 264 Pac. 1023; 57 A. L. R. 675;
People of the State of New York v. Beakes Dairy Co., 222 N. Y. 416; 119 N. E. 115; 3 A. L. R. 1260;
Nebbia v. New York, 291 U. S. 502;
Lemke as Attorney General of the State of N. Dakota et al. v. Farmers Grain Co., 258 U. S. 50.

The plaintiff strongly relies on the case of People of the State of New York v. Hawkins, 157 N. Y. 1, 42 L. R. A. 490, in support of its contention that neither the states nor Congress has the power to require convict-made goods to be so labeled.

The cited case was the divided opinion of the Court, and while the majority did decide that it was an unconstitutional exercise of power to mark goods "convict-made," the opinion was handed down in 1898. Conditions in trade and commerce have radically changed in thirty-seven years, and the reasons of the majority are not now well founded. [fol. 37] The opinion states as the only basis for the legislation the prevention of convict-made goods competing with free labor. This is not the only basis for such legislation. The labeling of goods "convict-made" does not interfere with placing the goods on the market, nor does it prohibit any person from buying them or dealing in them. When labeled the citizen knows where the goods he is buying were made. The labeling in no way interferes with the use of the goods, and does not affect their intrinsic value. It merely

prevents deceit and gives the public information of value to it, in determining whether or not it desires to purchase and use products manufactured in a penitentiary.

The case of Hammer v. Dagenhart, 247 U. S. 251, much relied on by the plaintiff; involved an Act of Congress that absolutely prohibited the shipment in interstate commerce of goods manufactured by children under the age of sixteen years. The Court held the act void. That act was one of absolute prohibition, while the Act here under consideration is one of regulation. The Court undertook to distinguish its opinion in that case from prior ones on the ground that the earlier acts were regulatory and this one prohibitory.

Plaintiff contends the United States is without police power similar to that exercised by the states. This contention is often made, and some of the opinions of the Courts would lend color to it, but when the question is closely examined it will be found that the Congress in exercising a power conferred on the Federal Government may adopt police regulations in the same form and manner as the States. Hoke v. United States, 227 U. S. 309; Butterfield v. Stranahan, 192 U. S. 470; Adair v. United States, 208 U. S. 161; Seven Cases v. United States, 239 U. S. 510; Cominetti v. United States, 242 U. S. 470; Brocks v. United States, 267 U. S. 432; Weber v. Freed, 239 U. S. 325; Yee Hem v. United States, 268 U. S. 178; University of Illinois v. United States, 289 U. S. 48.

Plaintiff's contention that the Act here in question must fail in all of its parts because in conflict with the Tenth and Fifth Amendments is fully answered by the reasons heretofore stated. The last ground urged is that it delegates power to the States exclusively lodged in the Federal Government. This deserves a more extended consideration.

The first section of the Act makes it unlawful to knowingly transport into a state goods manufactured by convict labor in violation of the local law. The validity of this [fol. 38] section depends on what power the Congress has over the prohibited goods in the first instance. If it has the power under the commerce clause to adopt the same regulations as the State has adopted, it can aid the State in the enforcement of its law and can adopt the State

law as its own in carrying out a power conferred on it by the Constitution. Joint action between the State and the Federal Government to remedy an evil should be encouraged when possible. Such a course promotes unity of action and harmony of purpose. It lessens conflict between the Federal and State Government and tends to uniformity of laws.

The principle of adopting state laws to carry out a Federal power is throughly settled in this country. In re. Rahrer, 140 U. S. 545; Clark Distilling Co. v. Western Maryland R. R. Co., 243 U. S. 311; United States v. Hill, 248 U. S. 420; Silz v. Hesterberg, 211 U. S. 31.

Power is lacking in either the Federal or State Governments to prohibit the shipment of labeled convict-made goods in either intra-state or interstate commerce. Such articles are legitimate objects of trade. So much of the Act here involved as prohibits their shipments or sale is void. Some of the States of the Union absolutely prohibit their shipment, and the Congress is without power to adopt or concur in the laws of these States containing absolute prohibition. However, this defect does not void so much of the Act here in question as provides for labeling the goods.

It may be safely assumed that the Congress would have passed an Act regulating the shipment of convict-made goods with the unconstitutional provision eliminated, because regulation is less severe than prohibition. El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87; Dorchy v. Kansas, 264 U. S. 286; Pollock v Farmers Loan & Trust Co., 158 U. S. 601; Howard v. Illinois Cen. R. Co., 207 U. S. 463; Little Rock & Ft. S. R. Co. v. Worthan, 120 U. S. 97; Berea College v. Kentucky, 211 U. S. 45.

The title to the Act here in question reads, "An Act to prohibit the Interstate Transportation of Prison Made Products in Certain Cases." The plaintiff insists that this title shows a clear intention on the part of Congress to pass only a prohibitory Act, but this conclusion is not tenable in view of the fact that the body of the Act does not prohibit the shipment of goods when properly labeled according to its terms. There is no ambiguity in the Act and prohibition only arises where it is sought to assist the States in enforcing prohibitory laws. White v. United [fol. 39] States, 191 U. S. 545; Holy Trinity Church v.

United States, 143 U. S. 457; Coosaw Mining Co. v. South Carolina, 144 U. S. 350.

The economic tide is inevitably forcing on the Courts the need for giving ever expending latitude to the commerce clause of the Constitution. Any other course will unerringly lead to a retardation of our civilization.

The plaintiff's petition will be dismissed. However, the injunction heretofore issued will be continued in force during appeal.

Elwood Hamilton, Judge.

Charles I. Dawson, Woodward, Dawson & Hobson, Attorneys for Plaintiff. Trabue, Doolan, Helm & Helm, Attorneys for Defendant. Judge Bunk Gardner, U. S. District Attorney, Eli H. Brown, III, Asst. U. S. District Attorney, Amicus Curiae.

October 3, 1935.

In United States District Court

Findings of Fact, Conclusions of Law, Declaration of Rights and Decree—Filed and Entered October 9, 1935

This cause having been submitted by agreement of parties for final decree upon the pleadings, and the court having considered same,—

Now, in conformity to the prayer of the petition and of Equity Rule 70½, the court makes the following findings of fact, conclusions of law, declaration of rights, and enters the following decree:

[fol. 40] Findings of Fact

1. The plaintiff, Kentucky Whip & Collar Company, is a corporation organized under the laws of the Commonwealth of Kentucky, with its principal place of business at Eddyville, Kentucky. It has been for many years and is now engaged in the business of manufacturing, in the Kentucky State Penitentiary at Eddyville, Kentucky, with convict labor, horse collars and strap goods, and has marketed and sold its products throughout the States of the Union.

2. The defendant, Illinois Central Railroad Company, is a corporation incorporated under the laws of Illinois,

and is a citizen of that State. It is engaged in the business of a common carrier by rail, and is the principal carrier of the plaintiff's products to its customers.

3. The amount in controversy exceeds Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

4. The plaintiff, on August 13, 1935, tendered to the defendant at its freight station at Eddyville, Kentucky, twenty-five separate shipments of collars and harness, manufactured by the plaintiff with prison labor at its plant in Eddyville, Kentucky, for the purpose of having these shipments transported by the defendant to the consignees thereof, each of whom was located in a State other than Kentucky. Ten of these shipments were consigned to customers in ten different States, each of whose laws prohibited the sale within the borders thereof of any goods or merchandise manufactured or produced, wholly or in part, by convict labor. Five of these shipments were consigned to States whose laws did not prohibit the sale therein of convict-made goods, but did require that any such goods exposed for sale or sold should be plainly marked so as to indicate that they were convict-made. Ten of these shipments were consigned to States whose laws impose no restrictions upon the sale or possession of convict-made goods within those States. All of the tendered shipments were for the purpose of filling bona fide orders theretofore received by the plaintiff. None of the packages or article therein contained bore any mark, label or brand thereon to indicate that the goods contained therein were manufactured or produced with prison labor. The defendant refused to accept said shipments and to transport same, and upon the bill of lading endorsed the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935.".

[fol. 41] 5. Plaintiff's products are useful articles of commerce, and are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used.

6. Not only had the defendant refused to accept and transport the specific shipments tendered on August 13, 1935, but it is and will be the policy of the defendant company to refuse any shipments from the plaintiff of its prison-made articles, where to accept and transport such

shipments would violate the terms of the Act of Congress approved July 24, 1935.

7. The continued refusal of the defendant to accept the shipments tendered will materially damage the plaintiff in its business, and the refusal of the defendant to accept other similar shipments will operate to practically destroy plaintiff's business, which is largely of an interstate character.

CONCLUSIONS OF LAW

1. The plaintiff has no adequate remedy at law.

2. The Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which prohibit the sale or possession of convict-made goods, is invalid, and beyond the constitutional power of Congress. To this ruling the defendant excepts.

3. The Act, in so far as it prohibits the shipment of convict-made goods into those States which require that convict-made goods shall be so labeled as to indicate that fact before being sold or offered for sale, unless such goods are so labeled before interstate shipment, is a valid exercise of the power of Congress under the Constitution. To this ruling the plaintiff excepts.

4. Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, before shipment, be so labeled as to indicate that they are convict-made, and the name and location of the prison where made, as is required by section two of the Act. To this ruling the plaintiff excepts.

5. Section two of the Act is separable, and is valid and enforceable, notwithstanding the invalidity, as herein indicated, of some of the provisions of section one of the Act; and that portion of section one of the Act which operates to prohibit shipment in interstate commerce of unlabeled convict-made goods into those States prohibiting the ex-
[fol. 42] posure for sale or sale of convict-made goods unless so labeled, is also separable from the invalid part of section one of the Act, and is valid and enforceable. To all of which the plaintiff excepts.

6. As the plaintiff did not label the articles shown by the bill to have been tendered to the defendant for shipment into those States requiring convict-made articles to be so labeled before sale or exposure for sale, so as to conform to such State requirements, the defendant was not required to accept such shipments and to transport same to their destination, irrespective of the provisions of section Two of the Act. To this ruling the plaintiff excepts.

7. As the plaintiff did not label any of the containers of any of the shipments set out in the bill, as required by section Two, of the Act, defendant was not required to accept any of said shipments or to transport the same. To this ruling the plaintiff excepts.

DECREE

It Is Therefore Ordered, Adjudged And Decreed:

1. That the plaintiff's petition be and the same is hereby dismissed at the cost of the plaintiff. To which ruling the plaintiff excepts.

2. As the plaintiff has indicated its intention to take an appeal to the Circuit Court of Appeals for the Sixth Circuit, It Is Further Ordered that the preliminary injunction heretofore issued shall continue in full force and effect pending such appeal.

Elwood Hamilton, U. S. District Judge.

October 9, 1935.

[fol. 43] IN UNITED STATES DISTRICT COURT

MOTION FOR ADDITIONAL FINDING OF FACT—Filed October 10, 1935

The plaintiff, Kentucky Whip & Collar Company, moves the court that, in addition to the court's finding of fact in paragraph 5 of its finding of facts, conclusions of law, declaration of rights and decree, the court further finds that plaintiff's products are not in and of themselves in any particular harmful to the general welfare of the communities into which they are shipped; and in support of this motion, plaintiff points out that in paragraph 4 of its bill it

is specifically alleged that the articles manufactured by the plaintiff are not in any particular, in and of themselves, harmful to the general welfare of the communities into which they are shipped and in which they are used. This fact, alleged in the bill, is not denied in the record, and can not be denied.

Kentucky Whip & Collar Company, by Woodward, Dawson & Hobson, Attorneys.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR ADDITIONAL FINDING OF FACT—Entered October 10, 1935

The court having considered the plaintiff's motion to find as a fact that the articles manufactured by the plaintiff in and of themselves are not harmful to the general welfare of the communities into which they are shipped and in which they are used, and being advised, overrules plaintiff's motion to make such finding; to which ruling the plaintiff excepts.

Elwood Hamilton, Judge.

October 10, 1935.

[fol. 44] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT—Filed October 10, 1935

The above named plaintiff, Kentucky Whip and Collar Company, conceiving itself aggrieved by the decree made and entered on the — day of October, 1935, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the assignment of errors which is filed herewith, and he prays that his appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

Woodward, Dawson & Hobson, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Entered October 10, 1935

This day came the plaintiff and tendered and offered to file its petition for appeal herein, together with its assignment of errors, which are ordered filed; and the court having considered same—

It Is Ordered that an appeal to the Circuit Court of Appeals for the Sixth Circuit from the decree entered herein on the 9th day of October, 1935, be and the same is allowed, and a certified transcript of the record herein be forwarded to the United States Circuit Court of Appeals for the Sixth Circuit, at Cincinnati, Ohio.

It Is Further Ordered that the appeal bond be and the same is fixed at the sum of Two Hundred Dollars ($200.00).

Elwood Hamilton, U. S. District Judge.

October 10, 1935.

[fol. 45] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed October 10, 1935

Now comes the plaintiff, Kentucky Whip & Collar Company, and makes and files the following Assignment of Errors, upon which it will rely upon its appeal from the decree and declaration of rights entered herein on the 9th day of October, 1935:

1. The court erred in holding that the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which require that convict-made goods shall be so labeled as to indicate that fact before being sold or offered for sale, unless such goods are so labeled before interstate shipment, is a valid exercise of the power of Congress under the Constitution.

2. The court erred in holding that Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, before shipment, be so labeled as to indicate that they are convict-made, and the name and location of the prison where made, as required by section Two of the Act of July 24, 1935.

3. The court erred in holding that section Two of the Act is separable, and is valid and enforceable, notwithstanding the invalidity of that part of Section One of the Act which operates to prohibit the shipment in interstate commerce of convict-made goods into those States where the sale of convict-made goods is prohibited by the law of such States.

4. The court erred in holding that that part of section One of the Act which operates to prohibit the shipment in interstate commerce of unlabeled convict-made goods into States requiring such goods, before sale or exposure for sale, to be so labeled as to indicate that they are convict-made, is separable, and is valid and enforceable, notwithstanding the invalid portions of section One of the Act.

5. The Court erred in holding that the defendant was not required to accept the shipments alleged in the bill to have been tendered to defendant for transportation to and delivery in those States whose laws require convict-made goods to be labeled as convict-made before sale or exposure for sale.

6. The court erred in holding that the defendant was not required to accept any of the shipments tendered to it as alleged in the bill, because the containers in which they were offered were not labeled, as required in section Two of the Act.

[fol. 46] 7. The court erred in holding that plaintiff was not entitled to the relief sought, and in dismissing its bill.

8. The court erred in refusing to find as requested by plaintiff that the articles manufactured by it in and of themselves are not harmful to the general welfare of the communities into which they are shipped and in which they are used.

Kentucky Whip & Collar Company, by Woodward, Dawson & Hobson, Attorneys.

Citation, in usual form, showing service on Trabue, Doolan, Helm & Helm, omitted in printing.

[fol. 47] Bond on appeal for $200.00, approved and filed October 10, 1935, omitted in printing.

[fol. 48] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed October 10, 1935

To Lilburn Phelps, Clerk of the United States District Court for the Western District of Kentucky:

You will please incorporate in the transcript of record on appeal to the United States Circuit Court of Appeals for the Sixth Circuit in the above entitled cause the following:

1. Bill in equity and petition for a declaration of rights.
2. Motion for permanent injunction and declaration of rights.
3. Motion to dismiss.
4. Stipulation.
5. Motion of the United States of America to be allowed to appear as Amicus Curiae.
6. Preliminary injunction.
7. Order of August 24, 1935.
8. Opinion of the Court.
9. Decree, findings of fact and conclusions of law.
10. Motion for additional finding of fact.
11. Order denying motion for additional finding of fact.
12. Petition for appeal.
13. Order allowing appeal.
14. Assignment of errors.
15. Citation on appeal and notice thereof accepted by the defendant.
16. Order approving appeal bond.
17. Copy of this praecipe.
18. Clerk's certificate.

Woodward, Dawson & Hobson, Attorneys for Plaintiff.

October 10, 1935.

[fols. 49 & 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MINUTE ENTRY

Cause Argued and Submitted April 8, 1936

Before Moorman, Hicks and Simons, JJ.

This cause is argued by Charles I. Dawson for Appellant and by Blakey Helm, G. E. Dean, and U. Bon Geaslin for Appellee and is submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DECREE—Entered June 1, 1936

Appeal from the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed June 1, 1936

Before Moorman, Hicks and Simons, Circuit Judges.

MOORMAN, Circuit Judge:

The appellant employs convict labor in the manufacture of horse collars and strap goods, including harness, in a state penitentiary at Eddyville, Kentucky. It tendered to the appellee, a common carrier, at its station at Eddyville, twenty-five packages of collars and harness manufactured by it for shipment to customers in states other than Kentucky. Some of the packages were consigned to customers

in states whose laws prohibit the sale within their borders of any goods or merchandise manufactured or produced by convict labor other than by convicts or prisoners on parole or probation; others were consigned to customers residing in states whose laws do not prohibit the sale therein of convict-made goods but require that any such goods exposed or offered for sale shall be plainly marked so as to indicate that they are convict made; and others to customers residing in states whose laws impose no restrictions upon the sale or possession of convict-made goods within their borders. The appellee refused to accept the packages for shipment, giving as its reasons therefor the prohibitions and requirements of the Act of Congress of July 24, 1935, (49 Stat. 494), the Ashurst-Sumners Act, which declares: (1) That it shall be unlawful to transport or cause to be transported any goods, wares or merchandise manufactured or produced by convicts or prisoners, except convicts or prisoners on parole or probation, from one state or territory to another state or territory in the United States, where such goods, wares or merchandise are intended by any person interested therein to be received, possessed or sold, either in the original package or otherwise, in violation of any law of such state or territory; and (2) that all packages containing any goods, wares or merchandise manufactured or produced by convicts or prisoners, except convicts or prisoners on parole or probation, when shipped or transported in interstate commerce, shall be plainly and clearly marked so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced may be readily ascertained on an inspection of the [fol. 53] outside of such package. Following the refusal, the appellant brought this action against the appellee seeking a mandatory injunction requiring the appellee to accept the goods for shipment when re-tendered to it, and for a decree declaring the Ashurst-Sumners Act an illegal exercise of the legislative power of Congress in violation of the Fifth and Tenth Amendments to the Constitution. The trial court found as a fact that the appellant had not labeled any of the packages so as to indicate that the articles therein contained were convict made, and dismissed the bill.

The decree is attacked on the ground that it gives effect to a statute which the Congress had no power, under the commerce clause of the Constitution, to enact. It is alleged in the bill that the articles tendered to the appellee were not "in any particular whatever harmful to health, or to the peace, good order or general welfare of the communities into which they are shipped or in which they are used." The lower court found, without hearing evidence, that they "are useful articles of commerce, and are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used." It is upon the theory that the goods are innocuous in their character that the appellant insists that the act in question is invalid. We think a proper analysis of the argument is to be made in the light of the effect of the sale of the goods in competition with goods manufactured by free labor. In this view it is pertinent to consider that a "preponderant number" of the states have enacted statutes either prohibiting the sale of convict-made goods within their borders or requiring such goods, before being offered for sale therein, to be plainly marked so as to indicate the source of their manufacture. "All such legislation," as said in Whitfield v. State of Ohio, — U. S. — (decided March 2, 1936), proceeds upon the view that free labor, properly compensated, "cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison." It was also said in that case that there is "ample support in fact" for the view that the sale of convict-made goods in competition with the products of free labor is an evil. From these pronouncements it is obvious that the legislation of the states designed to prohibit this evil must be deemed to have been [fol. 54] enacted pursuant to a sound public policy; indeed, it was so held in the case just referred to in sustaining such legislation in Ohio. The question for decision, therefore, is whether Congress, in aid of the enforcement of a valid public policy of the states, may pass a law excluding convict-made articles from interstate commerce, or requiring the packages containing such articles to be labeled to indicate that the contents are convict-made before permitting them to be shipped in interstate commerce.

The Act in question is the culminating step in a course of federal legislation dealing with convict-made goods sim-

ilar to that enacted by Congress with reference to the transportation of intoxicating liquors. In January of 1929 the Congress passed the Hawes-Cooper Act (45 Stat. 1084), which provided that all goods, wares and merchandise manufactured, produced or mined by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, except commodities manufactured in federal penal and correctional institutions for use by the federal government, transported into any state or territory of the United States for use, consumption or sale, should, upon arrival and delivery in such state or territory, be subject to the operation and effect of the laws of such state or territory to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced or mined in such state or territory, and should not be exempt therefrom by reason of their being introduced in the original package or otherwise. The Act is almost identical with fhe language of the Wilson Act (26 Stat. 313), which dealt with intoxicating liquors, and which was upheld against the contention that it was a delegation of federal power to the states. In re Rahrer, 140 U. S. 545; Rhodes v. Iowa, 170 U. S. 412. The Hawes-Cooper Act was upheld in Whitfield v. State of Ohio, supra. Finding that the Wilson Act was not affectual in preserving to the states their freedom to establish and pursue their own public policy affecting the manufacture and sale of intoxicating liquors within their borders, the Congress enacted the Webb-Kenyon law (37 Stat. 699), which prohibited the shipment of intoxicating liquors from one state or territory into another state or [fol. 55] territory intended by any person interested therein to be received, possessed, sold or used either in the original package or otherwise, in violation of any law of such state or territory. That act bore the same relation to the Wilson Act as the Act here in controversy bears to the Hawes-Cooper Act. It was upheld in Clarke Distilling Co. v. West'n Ry. Co., 242 U. S. 311.

The appellant contends, however, that the decision in the Clark Distilling Co. case and the cases sustaining acts closing the channels of interstate commerce to lottery tickets, impure foods and drugs, stolen automobiles, and the transportation of women for immoral purposes, are inapplicable, because the Congress was dealing in those acts with subjects

inherently harmful, and its products are useful and harmless. A sufficient answer to this contention, it seems to us, is that the evils which legislation of this character seeks to remedy are not only those inherent in the nature of the article, but also those resulting from its employment and disposition. It further contends that the right to exclude its products is controlled by the Child Labor Cases, 247 U. S. 251, and 259 U. S. 20, holding invalid an Act of Congress forbidding the transportation in interstate commerce of goods made by children of certain ages. The court was of opinion and held in those cases that the Act was an attempt by Congress to impress its views of a desirable state public policy upon the states, and that Congress could not interfere with the purely internal affairs of the states by enacting legislation fixing a minimum age at which children should be permitted to work, a subject reserved to the states under the Constitution. The cases, in our opinion, are inapplicable, for in the Act here under consideration there is no attempt to foist or impose a policy on the states. The Act is a regulation of commerce among the states but does not invade or interfere with the power of the states to regulate their own internal affairs. It was enacted in aid of the maintenance and enforcement of state laws as was the Webb-Kenyon Act, which was held to be a legitimate exertion of the power to regulate commerce and not to be a delegation of congressional power to the states. The Child Labor Acts, too, did not attempt to preserve to the states their freedom to establish and pursue their own policy within their borders, but attempted to use the powers of [fol. 56] Congress over interstate commerce to impose a policy upon the states in their internal affairs to which the federal authority does not extend.

Since Congress has the power to prohibit the shipment of convict-made goods into states having laws prohibiting the sale or possession of such goods or their exposure for sale without labeling them, it would seem necessarily to follow that in aid of the enforcement of such prohibitions it may require a labeling of all packages containing convict-made goods shipped or transported in interstate commerce, regardless of their destination.

The decree is affirmed.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 57] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,678. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 138. Kentucky Whip and Collar Company, petitioner, vs. Illinois Central Railroad Company. Petition for a writ of certiorari and exhibit thereto. Filed June 26, 1936. Term No. 138, O. T., 1936.

FILE COPY

FILED

JUN 26 1936

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 138

KENTUCKY WHIP AND COLLAR COMPANY, - Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY, - Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and Brief in Support Thereof.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No._____

KENTUCKY WHIP & COLLAR COMPANY, - *Petitioner,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case involves the constitutionality of an Act of Congress approved July 24, 1935 (49 Stat. 494; 49 U. S. C. A., Secs. 61-64), commonly known as the Ashurst-Sumners Act, said Act being in words and figures as follows:

"Chap. 412.—An Act To prohibit the interstate transportation of prison-made products in certain cases.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transportating any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

"Sec. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prison-

ers, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

"Sec. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

"Sec. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act."

The case was heard in the District Court for the Western District of Kentucky upon plaintiff's verified bill and petition for a declaration of rights (hereinafter called the bill) (R. 1-23) and upon defendant's motion to dismiss the bill (R. 24). The bill alleged the following facts:

The plaintiff, Kentucky Whip & Collar Company, is a corporation organized under the laws of the Commonwealth of Kentucky and engaged in the business of manufacturing in the Kentucky State Penitentiary at Eddyville with convict labor horse collars and strap goods, and in marketing same in the different States of the Union. The defendant, Illinois Central Railroad Company, is a corporation incorporated under the laws of the State of Illinois, and is engaged in the business of a common carrier by rail and is the principal carrier of the plaintiff's products to its customers. The plaintiff, on August 13, 1935, tendered to the defendant at its freight station at Eddyville, Kentucky, twenty-five separate shipments of collars and harness manufactured by the plaintiff with prison labor at its plant in Eddyville, Kentucky, for the purpose of having these shipments transported by the defendant to the consignees thereof, each of whom was located in a State other than Kentucky. Ten of these shipments were consigned to customers in ten different States, each of whose laws prohibited the sale within the borders thereof of any goods or merchandise manufactured or produced wholly or in part by convict labor. Five of these shipments were consigned to States whose laws did not prohibit the sale therein of convict-made goods, but did require that any such goods exposed for sale or sold should be plainly marked so as to indicate that they were convict-made. Ten of these shipments were consigned to States whose laws imposed no restrictions upon the sale or possession of convict-made goods within those States. All of the

tendered shipments were for the purpose of filling *bona fide* orders theretofore received by the plaintiff. None of the packages or articles therein contained bore any mark, label or brand thereon to indicate that the goods contained therein were manufactured or produced with prison labor. The defendant refused to accept said shipments and to transport same, and upon each bill of lading endorsed the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Plaintiff's products are useful articles of commerce and are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used. It will be the policy of the defendant to refuse any shipments from the plaintiff of its prison-made articles where to accept and transport such shipments would violate the terms of the Act of Congress approved July 24, 1935, and the continued refusal of the defendant to accept the shipments tendered and similar shipments will operate to practically destroy plaintiff's business, which is largely of an interstate character.

The relief asked was that the defendant be mandatorily enjoined and required to accept and transport each of the enumerated twenty-five shipments and all future shipments of a similar character which may be tendered to it by the plaintiff, and further for a binding declaration of rights adjudging that the Act of July 24, 1935 is violative of the Constitution of the United States.

The District Court filed an opinion (R. 29-39), and found the facts as above set out (R. 39-41). His conclusions of law (R. 41-42) were that the Act of July 24, 1935, is unconstitutional in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which prohibit the sale or possession of convict-made goods, but that the said Act is constitutional in so far as it prohibits the shipment of convict-made goods into those States which require that convict-made goods shall be so labeled as to indicate that fact before being sold or offered for sale, unless such goods are so labeled before interstate shipment, and that the Act is constitutional in so far as it requires the containers of all convict-made goods shipped in interstate commerce to be so labeled before shipment as to indicate that they are convict-made, with the name and location of the prison where made, and that the constitutional provisions of the Act are separable from the unconstitutional provisions. Having found that the tendered shipments were not labeled as required by the Act, the District Court dismissed plaintiff's petition (R. 42). The case was then appealed to the United States Circuit Court of Appeals for the Sixth Circuit, and on June 1, 1936, that Court affirmed the decree of the District Court (R. 51), and held the entire Act of July 24, 1935, to be constitutional (R. 52-56).

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The statute here involved vitally affects the right of the respective States to employ or permit the employment of their convicts in the manufacture of useful and harmless articles of commerce for sale and shipment in interstate commerce, and presents grave constitutional questions; and the public interest will be promoted by a decision by this Court of the questions involved.

2. The United States Circuit Court of Appeals, in holding that in the enactment of the law Congress did not transcend its constitutional powers, decided a federal constitutional question in a way probably in conflict with the applicable decisions of this Court.

3. The Circuit Court of Appeals, in holding that in the enactment of the law Congress did not transcend its constitutional powers, decided an important question of federal law, which has not been, but should be, decided by this Court.

PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court

for its review and determination a full and complete transcript of the record and all proceedings of the said Court had in this case, numbered and entitled on its docket No. 7235, Kentucky Whip & Collar Company, Appellant, v. Illinois Central Railroad Company, Appellee, to the end that this cause may be reviewed and determined by this Court, and that the decree of said Circuit Court of Appeals may be reversed, and for such further relief as to this Court may seem proper.

KENTUCKY WHIP & COLLAR COMPANY,
Petitioner.

By CHAS. I. DAWSON,
Counsel for Petitioner.

WOODWARD, DAWSON & HOBSON,
A. SHELBY WINSTEAD,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1936.

KENTUCKY WHIP & COLLAR COMPANY, - *Petitioner,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, - *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

The opinion of the United States District Court for the Western District of Kentucky (R. 29-39) is reported in 12 Fed. Supp. 37. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 52) was rendered June 1, 1936, and has not been officially reported.

II.

JURISDICTION.

1. The decree of the United States Circuit Court of Appeals for the Sixth Circuit, a review of which is here sought, was entered June 1, 1936 (R. 51).

2. The statutory provision which is relied upon to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (Sec. 347, Title 28 U. S. C. A.).

3. The suit is one in equity of a civil nature between citizens of different States, arising under the Constitution and laws of the United States, and the matter in controversy, exclusive of interest and costs, was alleged in the bill (R. 2) to exceed the sum of $3,000.00, and was so found by the Court (R. 40).

III.

STATEMENT OF THE CASE.

The statement in the preceding petition for a writ of certiorari, Par. I, pages 1-6, is hereby adopted and made a part of this brief without further elaboration.

IV.

SPECIFICATION OF ERRORS.

Petitioner intends to urge and rely upon each of the errors assigned in its assignment of errors in the District Court (R. 45, 46), which are as follows:

1. The Court erred in holding that the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which require that convict-made goods shall be so labeled as to indicate that fact before being sold or offered for sale, unless such goods

are so labeled before interstate shipment, is a valid exercise of the power of Congress under the Constitution.

2. The Court erred in holding that Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, before shipment, be so labeled as to indicate that they are convict-made, and the name and location of the prison where made, as required by Section Two of the Act of July 24, 1935.

3. The Court erred in holding that Section Two of the Act is separable, and is valid and enforceable, notwithstanding the invalidity of that part of Section One of the Act which operates to prohibit the shipment in interstate commerce of convict-made goods into those States where the sale of convict-made goods is prohibited by the laws of such States.

4. The Court erred in holding that that part of Section One of the Act which operates to prohibit the shipment in interstate commerce of unlabeled convict-made goods into States requiring such goods, before sale or exposure for sale, to be so labeled as to indicate that they are convict-made, is separable, and is valid and enforceable, notwithstanding the invalid portions of Section One of the Act.

5. The Court erred in holding that the defendant was not required to accept the shipments alleged in the bill to have been tendered to defendant for transportation to and delivery in those States whose laws require convict-made goods to be labeled as convict-made before sale or exposure for sale.

6. The Court erred in holding that the defendant was not required to accept any of the shipments tendered to it as alleged in the bill, because the containers in which they were offered were not labeled, as required in Section Two of the Act.

7. The Court erred in holding that plaintiff was not entitled to the relief sought, and in dismissing its bill.

8. The Court erred in refusing to find as requested by plaintiff that the articles manufactured by it in and of themselves are not harmful to the general welfare of the communities into which they are shipped and in which they are used.

V.

ARGUMENT.

POINT 1.

The Decision of the Circuit Court of Appeals Holding that Congress has the Power to Prohibit the Shipment of Convict-made Goods into States Having Laws Prohibiting the Sale or Possession of Such Goods, or Their Exposure for Sale, Without Labeling Them, is Contrary to and in Conflict with the Decisions of this Court.

The District Court found as a fact that petitioner's products are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used (R. 41). With such a finding in the record, the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court relating to goods pro-

duced in factories employing child labor. *Hammer* v. *Dagenhart*, 247 U. S. 251; *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20. As Congress lacks the power under the Constitution to prohibit the shipment of harmless articles in interstate commerce, this power can not be enlarged by State statutes. This Court said in *C. L. Ashton, et al.*, v. *Cameron County Water Improvement District No. One*, —— U. S. ——, decided May 25, 1936:

> "Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted."

The decision of the Circuit Court of Appeals seems clearly in conflict with the opinion of this Court in the case of *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311, sustaining the Webb-Kenyon Act, which prohibited the transportation in interstate commerce of intoxicants intended to be used, possessed or sold in violation of the laws of the State of destination. The last paragraph of that opinion (p. 332) contains an emphatic warning to Congress, and an equally emphatic assurance to citizens, that the power of Congress under the Constitution to regulate interstate commerce does not extend to prohibiting or limiting interstate movements of useful and harmless articles of commerce.

We think the Circuit Court of Appeals was in error in assuming that *Whitfield* v. *Ohio*, —— U. S. ——, 80 L. Ed. 527, 56 Sup. Ct. 532 (decided March 2, 1936), sustaining the Hawes-Cooper Act, is conclusive of the

questions here involved. That case merely involved the validity of an Act which provides that prison-made goods shipped in interstate commerce shall be subject to the laws of the State of destination upon their receipt by the consignee, whether in the original package or otherwise. The decision in the Whitfield case was clearly forecast, if not compelled, by the cases of *In Re Rahrer,* 140 U. S. 545, and *Rhodes* v. *Iowa,* 170 U. S. 412, which, when read together, would seem to clearly establish the doctrine that the right of a consignee to sell in the unbroken package an article shipped in interstate commerce, free of any restriction of State laws, is merely an incident of the right to do business in interstate commerce, which can be taken away by Congress, irrespective of the character of the article involved, without impairing the right of interstate commerce to be free from State interference or regulation in its fundamental aspects. As we read the Whitfield case, this Court did not have before it any question of the power of Congress to prohibit or limit the right of a citizen to sell, ship and deliver in interstate commerce useful and harmless articles, as is here presented. The question presented and considered by this Court in that case was the power of Congress to deprive a consignee of the right to sell in the unbroken package an article received through the channels of interstate commerce. While the opinion contains some discussion of the effect of selling prison-made goods in competition with the products of free labor, we respectfully submit that such discussion, particularly in view of the law as announced in the

cases of *In Re Rahrer, supra,* and *Rhodes* v. *Iowa, supra,* was not essential to a decision of the questions involved in the Whitfield case and should not be regarded as conclusive of the questions here involved; nor should that case be regarded as overruling the principle announced in *Clark Distilling Co.* v. *Western Maryland Railway Co., supra.*

POINT 2.

The Circuit Court of Appeals Erred in Holding that the Act is Valid in so Far as It Requires Labeling of All Packages Containing Convict-made Goods Shipped or Transported in Interstate Commerce, Regardless of Their Destination.

If petitioner's contention under Point 1 is correct, it, of course, follows that the decision of the Circuit Court of Appeals can not be sustained on its theory that labeling can be required in aid of enforcing a valid prohibition of interstate shipments of convict-made goods.

If the labeling provisions be construed separately, they are vulnerable to the same contentions advanced under Point 1. The difference in degree between prohibition and the requirement of labeling does not bring within congressional control goods which are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used. The labeling of convict-made goods serves no useful requirement in their movement in interstate commerce. Such a requirement can not be said to afford protection to

the public against fraud or imposition. The only result would be to appeal to the prejudices some classes of people may have against convict-made goods. The attainment of such a result is not a proper function of the police power. *People* v. *Hawkins,* 157 N. Y. 1; *Opinion of Justices of Supreme Judicial Court of Massachusetts,* 211 Mass. 605; *Matter of Foley,* 172 Calif. 744; *People* v. *Raynes,* 120 N. Y. Supp. 1053, affirmed 189 N. Y. 539; *Ex Parte Hayden,* 147 Calif. 649, 1 L. R. A. (N. S.) 184.

However, petitioner contends that it is not necessary to pass upon the validity of the labeling requirements of the Act. If petitioner is correct in its position that Congress can not prohibit the shipment in interstate commerce of prison-made goods, regardless of the laws of the States, Section 1 of the Act, in so far as it provides that goods shall not be shipped without labels into States which require labeling, can not be supposed to have been intended to stand alone, because the result would be that the Act would not apply to shipments into States where sales of convict-made goods are prohibited, but would apply to shipments into States requiring only labeling. Therefore, Section 1 in its entirety must be stricken, even though some of its provisions may be within the scope of congressional power. *The Employers' Liability Cases,* 207 U. S. 463; *Trade-Mark Cases,* 100 U. S. 82; *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126; *James* v. *Bowman,* 190 U. S. 127, 139; *Illinois Central R. Co.* v. *McKendree,* 203 U. S. 514, 527, 528; *United States*

v. *JuToy,* 198 U. S. 252; *United States* v. *Reese,* 92 U. S. 214, 220, 221; *Baldwin* v. *Franks,* 120 U. S. 678.

Section 2 of the Act, requiring labeling of packages regardless of the laws of the States into which they are shipped, must also fall with the invalid portions of Section 1. The Act has only four sections, and contains no separability clause. In the absence of such a clause, the presumption is against any intention on the part of the Legislature that the unobjectionable part of a statute should stand, even though other parts of the statute should be held invalid. *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 241, 242; *Lynch* v. *United States,* 292 U. S. 571; *Dorchy* v. *Kansas,* 264 U. S. 286; *Hill* v. *Wallace,* 259 U. S. 44; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *Trusler* v. *Crooks,* 269 U. S. 475, 482. Not only does the whole Act proclaim that it was the purpose of Congress not merely to require labeling of the containers of convict-made goods but to absolutely prohibit shipments of such goods where intended to be used in violation of the laws of the State to which they are consigned, but the title as well shows this to have been the purpose of Congress. The title reads as follows: "An Act to prohibit the interstate transportation of prison-made products in certain cases," and the title of an Act may be considered in determining the intent of Congress. *United States* v. *Fisher,* 2 Cranch, 358, 386; *Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 462; *White* v. *United States,* 191 U. S. 545; *Fairport R. Co.* v. *Meredith,* 292 U. S. 589.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the constitutionality of the Act of Congress here under attack may be promptly, finally and authoritatively determined, and to that end a writ of certiorari should be granted and this Court should review and reverse the decision of the United States Circuit Court of Appeals for the Sixth Circuit.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 138.

KENTUCKY WHIP & COLLAR COMPANY, - Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 138.

KENTUCKY WHIP & COLLAR COMPANY, - *Petitioner,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

BRIEF FOR PETITIONER.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Western District of Kentucky (R. 29-40) is reported in 12 Fed. Supp. 37, and the opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 48-52), which is here under review, is reported in 84 Fed. (2d) 168.

II.

JURISDICTION.

1. The suit is one in equity of a civil nature between citizens of different States, and involves the constitutionality of an Act of Congress approved July

24, 1935 (49 Stat. 494; 49 U. S. C. A., Sections 61-64), commonly known as the Ashurst-Sumners Act, and hence involves a controversy arising under the Constitution and laws of the United States. The matter in controversy, exclusive of interest and costs, was alleged in the bill (R. 2) to exceed the sum of Three Thousand Dollars, and was so found by the District Court (R. 41).

2. The United States Circuit Court of Appeals for the Sixth Circuit, on June 1, 1936, held the Act constitutional in its entirety, and the cause is before this court on certiorari granted October 12, 1936.

3. The statutory provision which is relied upon to sustain the jurisdiction of this court is Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.).

III.

THE ASHURST-SUMNERS ACT.

"An Act to prohibit the interstate transportation of prison-made products in certain cases.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or

in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

"Sec. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

"Sec. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise

shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

"Sec. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act."

IV.

STATEMENT OF THE CASE.

Pleadings.

In this brief petitioner will be hereafter referred to as plaintiff and the respondent as defendant, and, unless otherwise indicated, all italics are ours.

The case was heard in the District Court upon plaintiff's verified bill and petition for a declaration of rights (hereinafter called bill) (R. 1-24), and upon defendant's motion to dismiss the bill (R. 24-25). The bill alleged the following facts:

The plaintiff, Kentucky Whip & Collar Company, is a Kentucky corporation engaged in the business of manufacturing with convict labor at Eddyville, Kentucky, horse collars, harness and strap goods, and in marketing same in the different States of the Union.

The defendant, Illinois Central Railroad Company, is an Illinois corporation, engaged in the business of a common carrier by rail, with a line of railroad serving Eddyville, Kentucky, and is the principal carrier of the plaintiff's products to its customers. Prior to filing the bill plaintiff had tendered to the defendant at its freight station at Eddyville, Kentucky, twenty-five separate shipments of collars and harness manufactured by the plaintiff with prison labor at its plant in Eddyville, Kentucky, for the purpose of having these shipments transported by the defendant to the consignees thereof, each of whom was located in a State other than Kentucky. Ten of these shipments were consigned to customers in ten different States, each of whose laws prohibit the sale within the borders thereof of any goods or merchandise manufactured or produced wholly or in part by convict labor. Five of the shipments were consigned to States whose laws do not prohibit the sale therein of convict-made goods, but do require that any such goods exposed for sale or sold shall be plainly marked so as to indicate that they are convict-made. Ten of the shipments were consigned to States whose laws imposed no restriction upon the sale or possession of convict-made goods within those States. All of the tendered shipments were for the purpose of filling *bona fide* orders theretofore received by the plaintiff. None of the packages or articles therein contained bore any mark, label or brand thereon to indicate that the goods contained therein were manufactured or produced with prison

labor. The defendant refused to accept the shipments and to transport same, and upon each bill of lading endorsed the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Plaintiff's products are useful articles of commerce, and are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used. It will be the policy of the defendant to refuse any shipments from the plaintiff of its prison-made articles where to accept and transport such shipments will violate the terms of the Act of Congress approved July 24, 1935, and the continued refusal of the defendant to accept the shipments tendered and similar shipments will operate to practically destroy plaintiff's business, which is largely of an interstate character.

The bill charged that the Act is violative of the Constitution of the United States in the following particulars:

(a) It is not a valid exercise of the power conferred upon Congress by the commerce clause of the Constitution.

(b) It is an unconstitutional attempt on the part of Congress to deal with matters reserved to the States and to the people by the Tenth Amendment.

(c) It is violative of the Fifth Amendment, in that it deprives the plaintiff of its property, including its right to do business in interstate commerce, without due process of law.

(d) It is an unconstitutional attempt on the part of Congress to so exercise its power to regulate interstate commerce as to permit the respective States, under the protection of said Act, to prohibit and regulate interstate transactions between their inhabitants and the inhabitants of other States with reference to useful and harmless articles of commerce.

The relief asked was that the defendant be mandatorily enjoined and required to accept and transport each of the enumerated twenty-five shipments, and all future shipments of a similar character which may be tendered to it by the plaintiff, and further for a binding declaration of rights, adjudging that the Act is violative of the Constitution of the United States for the reasons above stated.

Rulings of the Lower Courts.

The District Judge found the facts as alleged in the bill (R. 40-42). His conclusions of law (R. 42-43), pertinent to this appeal, were:

1. That the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which prohibit the sale or possession of convict-made goods, is beyond the constitutional power of Congress; but in so far as the Act prohibits the shipment of convict-made goods into those States which require that such goods shall be so labeled before being sold or offered for sale as to indicate that they are convict-made, unless such goods are so labeled before interstate ship-

ment, is a valid exercise of the power of Congress under the interstate commerce clause of the Constitution.

2. That Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, before shipment, be so labeled as to indicate that they are convict-made, and the name and location of the prison where made, as is required by Section 2 of the Act.

3. That Section 2 of the Act is separable and is valid and enforceable, notwithstanding the indicated invalidity of some of the provisions of the Act, and that that portion of Section 1 of the Act which operates to prohibit shipment in interstate commerce of unlabeled convict-made goods into those States prohibiting the exposure for sale or sale of convict-made goods unless so labeled is also separable from the invalid part of Section 1 of the Act, and is valid and enforceable.

4. That as the plaintiff did not label the articles shown by the bill to have been tendered to the defendant for shipment into those States requiring convict-made articles to be so labeled before sale or exposure for sale, so as to conform to such State requirements, the defendant was not required to accept such shipments and to transport same to their destination, irrespective of the provisions of Section 2 of the Act.

5. That as the plaintiff did not label any of the containers of any of the shipments set out in the bill, as required by Section 2 of the Act, defendant was not

required to accept any of said shipments and to transport the same.

The decree denied plaintiff the relief sought, and dismissed the bill (R. 43).

On appeal, the decree of the District Court was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit (R. 48), that court holding the Act constitutional and valid in its entirety (R. 48-52).

V.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

As disclosed by the petition for a writ of certiorari herein, the plaintiff will urge and rely upon the error of the Circuit Court of Appeals in holding the entire Act constitutional and valid, and upon the following errors set out in its assignment of errors in the District Court (R. 45-46):

"1. The court erred in holding that the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which require that convict-made goods shall be so labeled as to indicate that fact before being sold or offered for sale, unless such goods are so labeled before interstate shipment, is a valid exercise of the power of Congress under the Constitution.

"2. The court erred in holding that Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, be-

fore shipment, be so labeled as to indicate that they are convict-made, and the name and location of the prison where made, as required by section two of the Act of July 24, 1935.

"3. The court erred in holding that section Two of the Act is separable, and is valid and enforceable, notwithstanding the invalidity of that part of section One of the Act which operates to prohibit the shipment in interstate commerce of convict-made goods into those States where the sale of convict-made goods is prohibited by the law of such States.

"4. The court erred in holding that that part of section One of the Act which operates to prohibit the shipment in interstate commerce of unlabeled convict-made goods into States requiring such goods, before sale or exposure for sale, to be so labeled as to indicate that they are convict-made, is separable, and is valid and enforceable, notwithstanding the invalid portions of section One of the Act.

"5. The court erred in holding that the defendant was not required to accept the shipments alleged in the bill to have been tendered to defendant for transportation to and delivery in those States whose laws require convict-made goods to be labeled as convict-made before sale or exposure for sale."

VI.

ARGUMENT.

It is quite evident that Congress sought to justify the legislation here involved under the commerce clause of the Constitution. Under its terms shipments to States which prohibit the sale of convict-made goods therein are absolutely prohibited if intended for sale in such States. Shipments into those States which require that goods made with convict labor shall be so labeled as to indicate that fact before exposure for sale are prohibited if the articles contained in such shipments are intended by those interested therein to be sold or exposed for sale without being so labeled. Thus, Congress has undertaken to make the right of a citizen of one State to sell and ship useful and harmless convict-made goods to a citizen of another State dependent upon the laws of the latter State. The validity of this legislation, in so far as it operates as an absolute prohibition of the shipment of useful and harmless articles of commerce from one State to another, depends upon whether or not Congress, under the commerce clause, possesses the power to prohibit such movement independently of any prohibitory State law; and its validity, in so far as it operates to require useful and harmless convict-made articles to be labeled to conform to the laws of the State of destination, likewise depends upon whether or not Congress, under the commerce clause, has the power to require such

labeling independently of any State law. State law, of course, adds nothing to the power of Congress.

> "Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted." *C. L. Ashton, et al.,* v. *Cameron County Water Improvement District No. One,* —— U. S. ——, decided May 25, 1936.

We therefore come to a consideration of the power of Congress, first, to absolutely prohibit the movement in interstate commerce of useful and harmless convict-made articles of commerce; second, to the power of Congress to require as a condition precedent to the movement of such articles in interstate commerce that they be labeled so as to indicate that they are convict-made; and, third, to the power of Congress to require as a condition precedent to the movement of such articles in interstate commerce that their containers be so labeled.

POINT 1.

Congress Cannot Prohibit the Movement in Interstate Commerce of Useful and Harmless Articles of Commerce Made by Convict Labor.

We have no disposition to question the plenary power of Congress to regulate interstate commerce; but this court more than once has emphatically declared that the power is one of *regulation*—not of *prohibition.*

In the case of *Hammer* v. *Dagenhart,* 247 U. S. 251,

this court, in defining the nature and extent of the commerce power of Congress, said (p. 269):

> "In *Gibbons* v. *Ogden,* 9 Wheat. 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said: 'It is the power to regulate; that is to prescribe the rule by which commerce is to be governed.' In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. *They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is, as to them but the exertion of the power to regulate.*"

Notwithstanding the well-established rule that the power of Congress under the commerce clause is that of *regulation,* not of *prohibition,* this court in a long line of cases has recognized that the regulation of interstate commerce in certain articles and as to certain practices, which are inimical to the health, safety, morals or general welfare of the public can only be accomplished by prohibiting the use of the instrumentalities of interstate commerce in the transportation

of such articles, or in facilitating and making effective such practices. In the case of *Hammer* v. *Dagenhart, supra,* the principle underlying these cases is thus explained (p. 271):

> "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended."

Cases illustrating the application of this principle are: *Champion* v. *Ames,* 188 U. S. 321, sustaining a federal law prohibiting the transportation in interstate commerce of lottery tickets; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, upholding a statute prohibiting the transportation in interstate commerce of impure or misbranded foods or drugs; *Hoke* v. *United States,* 227 U. S. 308, sustaining a federal statute prohibiting the transportation in interstate commerce of women for immoral purposes; *Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 U. S. 311, sustaining the Webb-Kenyon Act, which prohibits the transportation in interstate commerce of intoxicants intended to be used, possessed or sold in violation of the laws of the State of destination; and *Brooks* v. *United States,* 267 U. S. 432, sustaining the Dyer Act, making it a crime to knowingly transport in interstate commerce a stolen automobile. In every one of those cases the prohibition was justified by the court, not because of any power

in Congress to prohibit the movement in interstate commerce of ordinary articles of commerce, but as an *exercise of the power to regulate,* prohibition in those particular cases being necessary in order to accomplish regulation; and *each of those cases dealt with statutes closing the channels of interstate commerce to articles which, because of their inherent nature or their intended use, were inimical to the health, safety, morals or general welfare of the public, or with statutes closing the channels of interstate commerce to practices or acts criminal in nature or inimical to the health, safety, morals or general welfare of the public.* It is well settled, however, that no such power to regulate through prohibition can be exercised with reference to useful and harmless articles of commerce. As to such articles no regulation will be sustained, *where the regulation has no reasonable relation to facilitating or protecting interstate commerce.* The cases just referred to, and others of similar import, afford no support for the claim of power to prohibit the movement in interstate commerce of harmless articles. On the contrary, the reasoning used in those cases is direct authority against the existence of any such power.

In the case of *Clark Distilling Co.* v. *Western Maryland Railway Co., supra,* as above stated, there was involved the constitutionality of the Webb-Kenyon Act, and it was strenuously urged upon the court that to sustain that Act would amount to a construction of the commerce clause of the Constitution enabling Congress to close the door to the interstate transportation of *any* article of commerce which any State, under

the attempted exercise of its police power, might outlaw or burdensomely regulate, however harmless such article might be. The court answered that contention in this language (p. 332):

> "The want of force in the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, *the subject regulated and the extreme power to which that subject may be subjected.* The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guarantees such enlarged power could not be applied. In other words, *the exceptional nature of the subject here regulated* is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace."

Thus it is clear that Congress, under the commerce clause, cannot as an exercise of its independent will in the regulation of commerce or in order to accommodate its regulations to State laws, prohibit interstate commerce in useful and harmless articles. In the exercise of its power to regulate commerce, just as in the exercise of all its other great substantive pow-

ers, Congress is subject to the Fifth Amendment. This was expressly held by this court in the case of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 589. In Note 19 to that case Mr. Justice Brandeis cites a number of cases supporting the statement in the opinion that all the great substantive powers of Congress must be exercised with due regard to the Fifth Amendment, and among others he cites cases showing that such restriction applies to the exercise of the power to regulate interstate commerce. Therefore, no legislation of Congress under the commerce clause is valid if it operates to deprive a citizen of his property without due process of law. The term "property," as used in the due process clause of the Fifth Amendment, has the same meaning as attaches to it in the due process clause of the Fourteenth Amendment; *Coolidge* v. *Long*, 282 U. S. 582; *Heiner* v. *Donnan*, 285 U. S. 312; and is not restricted to tangible articles alone. The right to do business is property. The right to do business without unconstitutional regulations is property. The right to own property, to use it and sell it free of restrictions which would impair its sale value or its enjoyment is protected by the Fifth Amendment against national action, just as it is protected by the Fourteenth Amendment against State action, if the property is not of that inherently evil or harmful character, or capable of lending itself to evil or harmful uses justifying the exercise of the police power in relation thereto.

So, in its final analysis, this case comes down to the question of whether convict-made goods are in and

of themselves detrimental to the health, safety, morals or general welfare of the public, or are adapted to uses which will injuriously affect the health, safety, morals or general welfare, and therefore fit subjects for the exercise of the police power. Of course, within the States Congress does not possess police power as an independent substantive power. We recognize, however, that *in the good faith exercise of its granted powers,* Congress may *incidentally* accomplish the same purposes the States may accomplish in the exercise of their police power. That is to say, in the *legitimate* exercise of its power to *regulate commerce,* Congress may restrict or prohibit the movement in interstate commerce of those articles of commerce which because of their inherent character, or because of the use for which they are designed, are calculated to injuriously affect the health, morals, safety or general welfare. *However, as applied to the power of Congress in this respect, Congress has no power to look beyond the article itself. It can consider only the inherently evil or harmful qualities of the article itself, or the evil or harmful uses for which it is designed. It has no power, in framing its legislation under the commerce clause, to consider the evils, if any there be, in the manufacture and production of the article, because these activities are beyond the reach of congressional power.* Neither manufacture nor production is commerce of any character. The power of Congress under the commerce clause does not attach to the article *until it has started on its interstate journey or been delivered to a carrier for interstate trans-*

portation. If any power resides anywhere to regulate the manufacture or production of these articles, that power is in the State, not in the national government. It has been so held by this court in an unbroken line of opinions almost from the beginning of the Republic down to and including the very recent opinions of this court dealing with so-called New Deal legislation, purporting to have been enacted under the commerce clause. *Kidd* v. *Pearson,* 128 U. S. 1; *United States* v. *E. C. Knight Co.,* 156 U. S. 1; *Delaware, Lackawanna & Western R. Co.* v. *Yurkonis,* 238 U. S. 439; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344; *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210; *Schecter Poultry Corporation* v. *United States,* 295 U. S. 495; *United States* v. *William M. Butler,* 297 U. S. 1; *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

Congress, in exercising its power to regulate interstate commerce, must confine itself to interstate commerce, or such local activities as directly affect interstate commerce. It cannot, through a pretended exercise of its power, deal with what it may consider evils in the manufacture or production of articles of commerce. Such was the question decided by this court in the case of *Hammer* v. *Dagenhart,* 247 U. S. 251, heretofore referred to, and such was one of the evils in the National Industrial Recovery Act, the Agricul-

tural Adjusfment Act and the Guffey Coal Bill, which brought about their condemnation by this court.

Therefore, if this Act can be upheld as to the plaintiff, it must be upon the theory that the horse collars and harness made by it with convict labor are intrinsically harmful either to the public health, morals, safety or general welfare, or that they are adapted to uses harmful to the public health, morals, safety or general welfare. We cannot conceive that even the defenders of this law will have the temerity to contend that the articles manufactured by the plaintiff are intrinsically harmful either to the public health, morals or safety. It is inconceivable that horse collars and harness made by convict labor, by reason of any intrinsic qualities, can any more affect the public health, morals or safety than can goods made in factories every employee of which is a member of the American Federation of Labor. Neither can it be successfully argued that there is anything intrinsic in convict-made horse collars and harness tending to make them detrimental to the general welfare. Within themselves they are no more detrimental to the general welfare than they are to the morals, health and safety of the public. If they can be considered detrimental to the general welfare in any way whatever, it is not because of anything inherent in the articles themselves, but because of their manufacture by convict labor in competition with free labor; and this brings us back again to the proposition that regulation on the part of Congress, for the purpose of hampering, prohibiting or in any manner embarrassing or burden-

ing the manufacture of these articles is an invasion of a field denied to Congress by the Constitution. The principle involved in this case cannot be distinguished from that involved in *Hammer* v. *Dagenhart*. The court in that case distinctly held that articles made by child labor are in themselves harmless, and that the real purpose of the Act involved in that case was to regulate the manufacture of goods by child labor, and inasmuch as the power of Congress over the article itself does not attach until it is actually delivered to the common carrier for transportation in interstate commerce, or until the actual commencement of its journey to another State, Congress is without power to reach back to its method of manufacture as a basis for prohibiting its movement in interstate commerce. As observed by the court in that case (pp. 272, 273):

> "If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States."

On the oral argument of this case in the Circuit Court of Appeals, counsel for the defendant argued that the Child Labor Act involved in *Hammer* v. *Dagenhart* was essentially different from the Act here involved, in that the Child Labor Act was an absolute prohibition against movement in interstate commerce of the interdicted articles, while under the law here in-

volved the prohibition is against movement in interstate commerce only when such movement has for its purpose a violation of the laws of the State of destination. We are unable to see how such a distinction helps defendant's case. In view of the language of this court in *Hammer* v. *Dagenhart,* it cannot be doubted that the same conclusion would have been reached by the court had the law there involved prohibited the shipment only when the article was consigned to States that prohibited the employment of child labor. In such a case the real matter controlled and reached by the Act of Congress would have been the method of production—the very thing which *Hammer* v. *Dagenhart* holds is no legitimate concern of Congress. Congress was seeking the same end in the enactment of the Child Labor Act as was sought to be accomplished in the enactment of the Act here under consideration, and that end was the protection of presumably adequately compensated labor from competition with cheaper labor. In the Child Labor Case Congress proceeded upon the generally accepted theory that child labor is paid less than adult labor. Here Congress has proceeded upon the justified assumption that convict labor is paid less than free labor. If Congress does not possess the power under the commerce clause to close the channels of interstate commerce entirely or temporarily to merchandise manufactured by child labor, how can it be said it possesses any such power with reference to merchandise manufactured by convict labor? The result flowing from the merchandising of the product of either of these

two kinds of labor is to bring cheap labor in competition with better paid labor. In the *Dagenhart* case, however, this court said that the commerce power of Congress cannot be used to protect against this character of competition.

No doubt those seeking to sustain the law here involved will lean heavily upon the case of *Whitfield* v. *State of Ohio,* 297 U. S. 431. That case reached this court on certiorari to the Supreme Court of the State of Ohio, to review a judgment of that court affirming a judgment of the Court of Appeals of the Eighth District, Cuyahoga County, affirming a conviction of Whitfield in the Municipal Court of Cleveland for violating a statute of the State of Ohio, which, in part, provides:

> "After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other State by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this State."

The State statute also fixes penalties for a violation of its terms.

The information under which Whitfield was proceeded against contained two counts, the first one charging that Whitfield on a day named had, in the City of Cleveland, Ohio, sold on the open market a dozen Chambray men's work shirts, which had been manufactured in whole or in part by convicts in the State prison of Alabama. The second count charged Whitfield with unlawfully selling for shipment to R.

C. Kissack, via railway express from Wetumpka Prison in the State of Alabama to said Kissack in Lakewood, Ohio, six dozen Chambray men's work shirts manufactured by prisoners confined in the Wetumpka Prison. The case was tried on a stipulation of facts, which, as stated by this court, were "substantially the same as those set out in the information, with the addition, in respect of the first count, that the goods were sold in the original package as shipped by interstate commerce into the State of Ohio, and that there is nothing harmful, injurious or deleterious about the goods sold; that the six dozen shirts mentioned in the second count were not delivered to Kissack at the time of sale, but were to be shipped to his residence in Lakewood, Ohio, by railway express from the prison in Alabama." Whitfield was convicted on both counts; that conviction was affirmed by the Court of Appeals of Ohio for the Eighth District, and a petition in error to the Supreme Court of Ohio was dismissed by that court on the ground that no debatable constitutional question was involved.

The Ohio law involved in that case was undoubtedly passed and its effective date timed to coincide with the effective date of the Hawes-Cooper Act, which was approved January 19, 1929 (45 Stat. 1084; 49 U. S. C. A., Section 60). Section 2 of the Hawes-Cooper Act provides that it shall become effective five years after the date of its approval, which made it effective on January 19, 1934. That Act provides that when goods or merchandise, manufactured or produced in whole or in part by prison labor, are transported into any State

or Territory for use, consumption, sale or storage therein, such articles shall, upon arival and delivery in such State or Territory, be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such merchandise had been manufactured or produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise. It will be observed that that Act closely follows the Wilson Act. It subjects interstate shipments of prison-made goods to State control at the same point as interstate shipments of liquor are subjected to State control under the Wilson Act, as construed in the case of *Rhodes* v. *Iowa,* 170 U. S. 412, namely, upon receipt by the consignee.

We are not advised as to all of the constitutional questions attempted to be raised by Whitfield in the State courts of Ohio, but we *are* advised as to just what constitutional questions this court found were presented to it by the record. The court had this to say on that subject:

> "Petitioner assails the constitutional validity of the Ohio statute and also of the Hawes-Cooper Act. The record fails to show that the points made by petitioner in this court were properly raised in the trial court. But it sufficiently appears from the opinion of the appellate court that that court considered and passed upon the following contentions: that the Ohio statute abridged the privileges and immunities of petitioner as a citizen of the United States in violation of the Fourteenth

Amendment, by depriving him of the privilege of selling goods, manufactured in Alabama by prison labor, in competition with citizens of Ohio engaged in selling like goods; that the Ohio statute constituted an unauthorized regulation of and a burden upon interstate commerce; and that the Hawes-Cooper Act constituted an unlawful delegation of the power of Congress to the States. These questions, therefore, are properly here for consideration."

In view of the foregoing language, we have the right to conclude that this court considered no other questions, because, according to the opinion, no other questions were open for consideration on the record presented. The court rather summarily disposed of the first and last of the constitutional questions presented by the record. The court further held that a very serious constitutional question would be presented if the Ohio statute should be construed to prohibit such transactions as that covered by the second count of the indictment. For the reasons stated in the opinion, however, it was found not necessary to pass upon the constitutional power of the State to convict Whitfield on that count. After thus disposing of the second count, the court took up the question of whether the State statute, in so far as it attempts to prohibit the consignee of an interstate shipment of convict-made goods from selling same in the original package, constitutes a burden upon interstate commerce. A solution of that question, of course, involved a determination of the power of Congress to divest such shipments

of their interstate character after receipt by the consignee. The court pointed out that the Hawes-Cooper Act is, in substance, the same as the Wilson Act, and in this connection used this language:

> "That act is in substance the same as the Wilson Act with respect to intoxicating liquors, passed August 8, 1890, chap. 728, 26 Stat. at L. 313, U. S. C. A. title 27, section 121, as construed and upheld by this court. *Rhodes* v. *Iowa,* 170 U. S. 412, 421-423, 426, 42 L. Ed. 1088, 1094-1096, 18 S. Ct. 664; *Re Rahrer,* 140 U. S. 545, 559, 560, 562, 564, 35 L. Ed. 572, 575, 576-578. In effect, both acts provide (the one as construed and the other in terms) that the subject matter of the interstate shipment shall, upon arrival and delivery in any state or territory, become subject to the operation of the local laws as though produced in such state or territory; and shall not be exempt therefrom because introduced in original packages. Each statute simply permits the jurisdiction of the state to attach immediately upon delivery, whether the importation remain in the original package or not. In other words, the importation is relieved from the operation of any rule which recognizes a right of sale in the unbroken package without state interference—a right the exercise of which never has been regarded as a fundamental part of the interstate transaction, but only as an incident resulting therefrom. *Rhodes v. Iowa, supra* (170 U. S. 420, 423, 424, 42 L. Ed. 1094, 1095, 18 S. Ct. 664). The interstate transaction in its fundamental aspect ends upon delivery to the consignee."

We respectfully submit that this language, when considered in connection with the two cases of *Re Rahrer* and *Rhodes* v. *Iowa,* was adequate to completely dispose of the question then under consideration, and did completely dispose of it.

Re Rahrer, 140 U. S. 545, cited by the court, directly involved the constitutionality of the Wilson Act. In that case the court held that in the absence of permissive congressional legislation, an interstate shipment of an article is protected against State action up until its receipt by the consignee, and, if sold by him in the original package, until such sale has been completed and delivery thereof made. This principle, as indicated by the court, is bottomed upon the proposition that articles moving in interstate commerce are beyond the reach of State authority (with the exception of regulations in the nature of inspection and health measures) until they have become incorporated into the general mass of property in the State of destination. On this point the court said (p. 562):

> "The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State. 12 Wheat. 448.
>
> "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

It is apparent from the foregoing language that the court was of the opinion that it is within the competency of Congress to divest articles shipped in interstate commerce of their interstate character upon the receipt thereof by the consignee and before he sells same, even though when sold the article is in the original package. It is equally clear that this power of Congress was not considered by the court to be confined to those articles of commerce which are fit subjects for the exercise of the police power. The *Rahrer* case contains no language indicating that the exertion of this power of Congress is confined to such articles. That case is ample authority for the proposition that the right of the consignee of an interstate shipment to sell same in the original package, free from the interference of State law, is such a mere incident of interstate commerce that it can be safely surrendered to the control of the respective States without impairing the fundamental essentials of interstate commerce so necessary to be kept under the exclusive authority of the national government; and that this was the basis for the decision in that case is clearly shown by a further discussion of the principle in the case of *Rhodes* v. *Iowa*, 170 U. S. 412. In that case the court, in discussing the rule that in the absence of permissive congressional legislation the consignee of an interstate shipment is entitled to sell same in the original package free from State control, but that Congress can confer upon the States the right to regulate such sales, had this to say (pp. 423, 424):

"The words 'original packages' had, at the time of the passage of the act by the decisions of this court, acquired with reference to the construction of the Constitution a technical meaning, signifying that the merchandise in such packages was entitled to be sold within a State by the receiver thereof, although State laws might forbid the sale of merchandise of like character not in such packages.

"Whilst it is true that the right to sell free from State interference interstate commerce merchandise was held in *Leisy* v. *Hardin* to be an essential incident to interstate commerce, *it was yet but an incident, as the contract of sale within a State in its nature was usually subject to the control of the legislative authority of the State.* On the other hand, the right to contract for the transportation of merchandise from one State into or across another *involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State.*"

We submit, therefore, that the two cases of *Re Rahrer, supra,* and *Rhodes* v. *Iowa, supra,* clearly establish: First, that Congress, without being guilty of delegating any of its power under the commerce clause, may divest an article shipped in interstate commerce of its interstate character after its delivery to the consignee and before sale in the original package; and, second, while the two opinions referred to dealt with a law thus divesting intoxicating liquors of

their interstate character, they clearly show that the character of the article has nothing to do with the exercise of the power, and that therefore the power may be exercised with reference to useful and harmless articles of commerce, as well as with reference to articles which are commonly considered as fit subjects for the exercise of the police power. Indeed, *it is very doubtful if* there is any really sound basis for the proposition that interstate commerce was intended by the framers of the Constitution to protect the consignee of an interstate article in the sale thereof in the original package. Logically, it would appear that an interstate transaction involving the sale of merchandise is concluded when the article had been delivered to the consignee. State regulation of the sale or the use of the article after its receipt by the consignee can, at most, only indirectly and incidentally affect interstate commerce in its fundamental essentials. The idea that interstate commerce protects the consignee in original package sales apparently grew out of the opinion of this court in the case of *Brown* v. *Maryland,* 12 Wheat. 419, 446, 447. *In that case, however, the court was not dealing with commerce among the States.* It was dealing with immunity from State taxation of imports from foreign countries under Paragraph 2 of Section 10 of Article 1 of the Constitution. After holding that such imports are free from State taxation, except to the extent and in the manner provided by the Federal Constitution, Chief Justice Marshall in his opinion used this language (p. 449):

> "It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State."

This language of the great Chief Justice is subject to two criticisms: First, articles shipped from one State to another are not imports within the meaning of the Constitution; and, second, the quoted language is dicta; and both of these criticisms of the quoted language were made by this court in *Woodruff* v. *Parham,* 8 Wall. 123. This latter case fully sustains our view that the commerce clause of the Constitution does not confer upon the consignee of an interstate shipment the right to sell same in the unbroken package free of non-discriminatory State regulations or burdens. Such was also the conclusion of this court in the case of *Hinson* v. *Lott,* 8 Wall. 148.

The opinion in the more recent case of *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, contains a very thorough discussion of the power of the States to impose a non-discriminatory tax upon goods brought in from other States while still in the original package. In that case the court reaffirmed the rule laid down in *Woodruff* v. *Parham, supra,* and the cases following it, that such merchandise, or the sale of same, may be the subject of a non-discriminatory tax; and it seems to us that opinion lends very strong support to our view *that interstate commerce in articles shipped from one State to another ends with the delivery of the article to the consignee.* At any rate, whether such is the correct rule or not, it seems quite clear from the cases

of *Re Rahrer, supra,* and *Rhodes* v. *Iowa, supra,* that Congress has the power to divest such articles of the protection of interstate commerce upon receipt by the consignee. If we are correct in our analysis of those two cases, then the power of Congress to enact the Hawes-Cooper Act is clear, and we respectfully submit it was unnecessary for the court in the Whitfield case to enter into any consideration of the nature of convict-made goods or the effect they may have upon free labor when sold in competition with the products of free labor, and we respectfully submit that the discussion of these questions in the Whitfield case should not be permitted to weigh against our contentions in this case. This is especially true, in view of the fact that if what we consider to be *dicta* in the Whitfield case is accepted as binding in this case, then this court must wholly disregard two other of its well-considered opinions. We refer to the cases of *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, and *Hammer* v. *Dagenhart,* 247 U. S. 251. Neither of those cases was expressly overruled by the Whitfield case, nor is there any language in that opinion indicating that the court intended to impair the force of those cases as authority on the questions of law therein dealt with.

The opinion in the *Clark Distilling Company* case shows beyond any sort of question that the Webb-Kenyon Act was sustained *solely because of the nature of the article* (intoxicating liquor) *therein dealt with. It was justified by the court on that ground and on that ground alone, and the opinion contains an*

emphatic warning to Congress, and an equally emphatic assurance to the citizens of this country, that the power of Congress under the Constitution to regulate interstate commerce does not extend to prohibiting or limiting the interstate movement of useful and harmless articles of commerce. Such was also the ruling in the case of *Hammer* v. *Dagenhart, supra,* and in that case the court held by the clearest kind of implication, if not in actual language, that the power of Congress to prohibit or limit the movement in interstate commerce of articles of commerce is restricted to those articles which, because of their inherent nature or the use for which they are intended and adapted, are inimical to the public health, morals or safety, or to the general welfare; *that when Congress undertakes to deal with an article moving in interstate commerce, or offered for movement in interstate commerce, it is restricted to dealing with the article itself. It cannot enlarge its power by considering the origin or method of production of the article.* These are matters beyond the reach of the national government.

In the Circuit Court of Appeals counsel for the defendant relied upon the cases of *Weber* v. *Freed,* 239 U. S. 325; *Scharrenberg* v. *Dollar Steamship Co.,* 245 U. S. 122, and *Church of Holy Trinity* v. *United States,* 143 U. S. 457, in support of their claim that Congress has the power to prohibit the shipment of convict-made goods in interstate commerce in order to protect the free labor of the country against unfair and ruinous competition. Those cases, however, have no bear-

ing whatever on the question here presented. *They involved the power of Congress to regulate commerce with foreign countries—a much broader power than the power of Congress to regulate commerce among the States.* Congress has the power to absolutely prohibit commerce with foreign countries. In dealing with such commerce Congress is not restrained by the due process clause of the Fifth Amendment, or by any other provision of the Constitution. It is thoroughly settled that no person has a vested right to engage in foreign commerce. See: *Butfield* v. *Stranahan,* 192 U. S. 470; *Brolan* v. *United States,* 236 U. S. 216; *The Abby Dodge,* 223 U. S. 166; and also *Scharrenberg* v. *Dollar, supra.*

Here, as in the lower court, counsel for the defendant will doubtless refer to certain federal statutes, regulating and prohibiting the interstate shipment of the dead bodies of game animals and game birds killed or possessed in violation of State law. Those statutes are all parts of the Act of May 25, 1900, commonly known as the Lacey Act, typical examples being Sections 392, 393, 394 and 395, Title 18, U. S. C. A. Those statutes deal with situations not at all analogous to the one here involved. Section 392 prohibits the transportation in interstate commerce of wild animals or birds killed or shipped in violation of the laws of the State, territory or district where killed or from which they are shipped. Section 393 requires all packages containing dead bodies or plumage, or any part thereof, of game animals or game or other wild birds to be plainly marked so as to indicate the contents and the

name and address of the shipper, when shipped in interstate commerce. Section 394 provides penalties, and Section 395 provides that the dead bodies of such game animals, or game or wild birds, shall be subject to the laws of the State upon arrival therein, to the same extent and in the same manner as though such animals or birds had been produced in such State or territory, regardless of whether such shipments are in the original packages or otherwise. It is the theory of the law, repeatedly announced by this court, that wild life is the property of the State in which it is found, and that therefore the State can place such restrictions upon the taking or the killing thereof as the Legislature may determine. *Carey* v. *South Dakota*, 250 U. S. 118; *Lacoste* v. *Department of Conservation*, 263 U. S. 545. Wild life taken, killed, possessed or shipped in violation of State law is, of course, contraband, and Congress may close the channels of interstate commerce to same, just as it may close the channels of interstate commerce to the movement or stolen or other illegally possessed goods. Furthermore, in so far as the statutes referred to deal with the transporta on of migratory birds, they can be justified under the treaty making power of the United States and the Migratory Bird Treaty between the United States and Great Britain concluded on August 16, 1916.

In the Circuit Court of Appeals counsel for the defendant also relied upon the case of *Griswold* v. *President of the United States*, 82 Fed. (2d) 922. That case, however is no aid to the solution of the problem we have here. In that case was involved the

constitutionality of the Act of Congress known as the Connally Act, approved February 22, 1935 (15 U. S. C. A., Sections 715-715l). That Act simply prohibits the shipment in interstate commerce from a State of oil which has been produced in violation of the laws of that State. *It does not attempt to close the channels of interstate commerce to oil produced in a State when such production does not violate the laws of the State of production.* Assuming the laws of a State controlling the production of oil are valid, it may be admitted that the Federal government, under the commerce clause, may co-operate with the State government in the enforcement of its conservation statute to the extent of prohibiting the channels of interstate commerce from being used by the *oil producers of that State* to violate the production statutes thereof. That is to say, if Texas has a valid statute regulating the production of oil and making it illegal to produce oil in excess of the limits fixed by the statute, we can perceive of no sound reason why Congress may not provide that the excess over that allowed under the laws of Texas shall not be shipped out of Texas in the channels of interstate commerce. Such an Act does not operate to give to the laws of Texas extra-territorial effect. *A very different situation is presented, however, if the Act of Congress should go further and provide that no oil produced in Kentucky, or any other State having no limitation upon production, shall be shipped into Texas.*

POINT 2.

Congress Has No Power to Exclude From Interstate Commerce Convict-made Goods Unless Labeled as Such.

Of course, if Congress has the power to prohibit the shipment of convict-made goods, it would also have the power to require such goods, when offered for shipment, to be so labeled as to indicate that they are convict-made. Such a provision would aid in the enforcement of the prohibitory provision. On the other hand, if Congress does not possess the power to prohibit the shipment of convict-made goods, then the labeling provision cannot be sustained as one in aid of the prohibitory provision. It was suggested in the lower court, however, and we presume will be argued here, that Congress has the power to require convict-made goods to be labeled as such, in order to protect the public against deceit, fraud and imposition. If the labeling of plaintiff's convict-made goods, or any other convict-made goods, could be said to have any real relation to the quality of the material or workmanship in the article, then there might be some justification for requiring convict-made goods to be labeled as such. But how can the label "convict-made" possibly disclose to the public any information as to whether the article is of inferior quality or workmanship? *Such a label does not show the quality of the material out of which the article is made, nor does it show the character of workmanship. There is no justification whatever for any assumption of inferiority in a convict-made article as compared to a similar ar-*

ticle manufactured with free labor. There is just as much justification for assuming that goods made in one factory by free labor are inferior to goods made in some other factory by free labor; or that goods made in some factories by free labor are inferior to goods made in other factories by prison labor. If there is any ground for assuming that the *workmanship* or material of prison-made goods is of an inferior quality, that inferiority would be just as apparent without branding as would be such inferiority in competing goods made by free labor; and to require the branding of prison-made goods in order to notify the public of their inferiority, without requiring a corresponding branding of inferior goods made by free labor, would be the rankest kind of arbitrary discrimination. *Moreover, to reach the conclusion that any part of the Act here involved was enacted to protect the buying public against fraud or deceit is to convict Congress of a willingness to protect the people of some States against fraud and deceit in the sale of convict-made goods, and to leave others unprotected.* The statute makes no provision for the labeling of any convict-made goods shipped into those States where there are no restrictions upon the sale of such goods. All it requires as to shipments to such States is that the *container* shall be labeled, thus leaving the merchant free, after he has received the goods, to take them out of the container and sell them, without any notice to the public that they are convict-made.

The fallacy of the argument that such a label tends to protect against fraud and imposition is thoroughly exposed in the case of *People* v. *Hawkins,* 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490. In that case there was

involved the power of the Legislature of New York to require convict-made goods to be so labeled as to indicate that fact. The court pointed out that convict-made goods are not of themselves detrimental to the health, morals, safety or general welfare of the public, and that the only purpose to be served by the legislation was to place convict-made goods at a disadvantage in competition with goods made by free labor, and that the State cannot use its police power for any such purpose. The court said (p. 6):

> "We may assume, therefore, that the purpose of the law was to promote the welfare of the laboring classes by suppressing, in some measure, the sale of prison-made goods. Waiving for the present the question whether the means employed can ever in the nature of things accomplish the end in view, it is quite clear that unless this statute in some degree affects the value of certain articles of merchandise by restricting the demand or imposing conditions upon the right to deal in them as property, in order to exclude them from the market, it is a mere *brutum fulmen*. The scrubbing brush in question was beyond all doubt an article of property in which the defendant could lawfully deal. He is forbidden, however, by this statute, under all the penalties of the criminal law, from buying or selling or having it in his possession, except upon the condition that he shall attach to it a badge of inferiority, which diminishes the value and impairs its selling qualities. It is not claimed that there is any difference in the quality of this scrubbing brush when compared with one of the same grade or character made out-

side the prisons. There is no pretense that the Act was passed to suppress any fraudulent practice or that any such practice existed with respect to such goods. The validity of the law must depend entirely upon the exercise of the police power to enhance the price of labor by suppressing through the instrumentality of the criminal law, the sale of the products of prison labor.

"The citizen can not be deprived of his property without due process of law. * * * Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment and the practical effect and operation that they may have upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection. * * *

"It is entirely safe to assert that no court has yet invoked the police power to justify a statute, the purpose of which was to enhance the wages of labor in certain factories, by suppressing, through the agencies of the criminal law, the sale of competing products made in prisons. If the wages of labor in a few factories producing goods such as are also made in prisons may be regulated by the police power, there is no reason why that power may not be used to regulate the rewards of labor in any other field of human exertion. That all legislation of this character, with this end in

view, which subjects the individual to criminal prosecution unless he will comply with regulations in the sale of such goods that are intended to depress their value or demand in the market, is in violation of the Constitution, can not be doubted.

"It would be trifling with the Constitution to attempt to uphold this law on the ground that all producers or vendors of goods may be required to tell the truth concerning them, both as to their quality and the means by which or the place where they were manufactured. A knowledge of the truth concerning the origin of every article of property which is the subject of sale, trade or commerce can not be essential to the public welfare, and even if it was the law could be effective only when applied to all property alike and not limited to articles made in certain places and by a certain class of workmen. Any attempt to carry the police power to such an extent as to require the owner of an article of property kept for sale, such as a scrubbing brush, to label it with a history of its origin and to indicate the place where it was made and the class of workmen that produced it, and to enforce such regulations by the aid of the criminal law, must be regarded as an inexcusable and intolerable invasion of the rights and liberty of the citizen."

In 211 Mass. 605, 98 N. E. 334, 27 Am. & Eng. Ann. Cas. 815, there is an opinion of the Justices of the Supreme Judicial Court of Massachusetts, delivered in response to a request of the Legislature, as authorized by the laws of that State, for an opinion as to the constitutionality of a proposed law of Massachusetts

requiring all convict-made goods, whether made in Massachusetts or elsewhere, to be so labeled as to indicate that they were convict-made, before being exposed for sale. The court held that such a law could not be upheld. While the specific ground upon which the court based its opinion was that as to goods made in other States the proposed legislation would be a burden on interstate commerce, yet the opinion clearly discloses that it was the view of that court that such a regulation, even as to goods manufactured in Massachusetts, was an improper exercise of the police power. The court said (p. 607):

> "Plainly the purport of the bill is to affect the availability and attractiveness in the market of the branded or labeled goods. There is nothing wrong in the nature of things in prison ... goods. The employment of those convicted of crime in healthful labor is recognized as a necessity of confinement, whether its end be punitive or reformatory. The learning of useful trades has been established by statute as a part of the policy of this Commonwealth in the discipline and improvement of those paying the penalty prescribed for the commision of crime. It is a part of intelligent humanitarianism in the treatment of those under sentence. Such goods are not unsanitary or so inferior in quality that their sale would constitute a fraud on the public. This is manifest from the bill, which in section 5 excepts from its terms goods, wares and merchandise used by the Commonwealth, or by any county or municipality therein, or by any public institution. It can not be presumed that the general public needs

a protection in these respects which is denied to instrumentalities of government and to benevolent, educational, and other charitable and public institutions. Differences in grade of workmanship, if there are any, would be as apparent without branding as in like products made in private shops."

The next to the last sentence in this quotation is peculiarly applicable to the Act here under consideration, in view of the provision of Section 1 exempting from the provisions of the Act goods manufactured in Federal prisons for the use of the Federal Government.

State statutes requiring dealers in convict-made goods to take out a license and to give a bond, pay an annual license fee, and to make annual statements disclosing their transactions in such goods, have been held unconstitutional on the ground that such legislation is arbitrary and unreasonable. See: *People* v. *Raynes,* 120 N. Y. Supp. 1053, affirmed in 198 N. Y. 539.

The case of *Ex Parte Charles E. Hayden,* 147 Calif. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, did not involve the right of the State to require the labeling of convict-made goods, but did involve the same principle. The law involved in that case required all boxes, barrels or packages containing fruit exposed for sale in California to be so stamped as to correctly show the county and immediate locality in which such fruit was grown. The court held that this was unconstitutional legislation and beyond the police power of the State. It was pointed out that the only effect of the Act was to give the growers of fruits in those sections of the State

which had established a reputation for fine fruit an advantage over those growers of fruit located in other sections, and that the police power of the State could not be exercised for any such purpose.

In *Matter of Foley,* 172 Calif. 744, 158 Pac. 1034, there was involved the validity of an Act of California requiring every dealer selling imported eggs to stamp on each egg the word "Imported," and to display on his place of business a sign reading "Imported Eggs Sold Here." The court held that this was not a valid exercise of the police power of the State; that the law did not require such dealers to disclose the *age of the eggs;* and that the mere fact that the eggs were imported did not justify the conclusion that they were any older or any less fit for use than domestically produced eggs sold in competition with them. The necessary effect of the Act was thus described by the court:

> "Its only result would be not to protect the public from the sale of stale eggs, but to aid the domestic producer by appealing to the prejudices of people against eggs produced in foreign lands."

Similarly, the labeling of convict-made goods or the containers thereof cannot have the effect of protecting the public against fraud or imposition. Such labeling can only serve to enable those competitors whose products are made by free labor to appeal more effectively to the prejudices which may exist with some classes of our people against convict-made goods.

In the case of *Matei* v. *Hecke,* 99 Calif. App. 747, 279 Pac. 470, there was involved an Act of the State

of California requiring that grapes in containers other than those packed in sawdust, cork, etc., and in certain standard containers established by the Act, could be sold only when the container was labeled in conspicuous letters "Irregular Container." The court held that such a requirement would not have the effect of assuring the purchaser that he was getting a certain quantity or quality of grapes, and that therefore the requirement of the Act could not be regarded as a valid exercise of the police power of the State to protect the public from short weights, dishonest packing, inferior goods, and the like.

Doubtless, the case of *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, will be relied upon by counsel for the defendant. That case involved the validity of a statute of the State of Oregon under which the proper State authority had prescribed standard containers for raspberries and strawberries. The court simply held that the regulations could not be considered arbitrary or capricious, since the *regulations bore a reasonable relation to the protection of buyers of strawberries and raspberries, and to the preservation of such fruits.*

The case of *Detweiler* v. *Welch,* 46 Fed. (2d) 75, which will probably be cited by counsel for the defendant is easily distinguishable from the case we have here. That case involved the validity of an Idaho law requiring the grading of potatoes and the marking of the containers to show the grade when the potatoes are shipped to another State. It was claimed that the law was not a valid exercise of the police power, and

also constituted an unconstitutional burden on interstate commerce. The Act required that when the potatoes did not conform to the quality, grade and size of some of the other grades fixed by the statute, the container should be marked with the words "Cull Potatoes." It was urged that as potatoes are useful and harmless articles of commerce, to require a certain grade of sound potatoes to be branded as culls would indicate to the consuming public in distant States that they were unfit for human consumption. The court held that no such deduction could be fairly drawn from such marking; that the real theory and purpose of the Act was to promote the marketability of the product, and that the grading of the product according to its size and to the further rules laid down in the Act was to enable the seller to demand and obtain for his product the prices which its particular quality and grade entitled him to receive.

This court, of course, judicially knows that not only are potatoes sold by grade, but that fruit, tobacco, wheat, corn, cotton, wool and many other products are also sold according to the respective grades into which they fall according to market practices, or, in some cases, according to statutory provisions. *The grading in all these cases is based upon the inherent difference in value and quality of the articles falling in the respective grades.* Thus, No. 1 wheat brings a better price than No. 2, and No. 1 corn a better price than No. 2 corn. Leaf tobacco brings a better price than lugs, and lugs usually a better price than trash. *The Idaho Potato Grading Act simply recognizes this*

inherent difference in the grade of potatoes and requires them to be labeled accordingly. This invades no property right of the owner of those potatoes. The law, as does their own inherent quality, simply requires them to be labeled for what they are.

Horse collars and harness, manufactured by convict labor, however, by no trade practice and by no inherent inferiority fall into a class or a grade different from similar goods manufactured by free labor.

Although there was no proof in the record to support same, the District Judge in his opinion made this statement (R. 35, 36):

> "It has been the practice in some instances of persons dealing in convict-made goods to represent that the manufacturing was done in free institutions and by skilled labor. The Federal Trade Commission has found this to be an unfair trade practice. See the proceedings of that body In the Matter of Commonwealth Manufacturing Company and Harry Dushoff, doing business under the trade names and styles of Harry Dushoff & Company and Chicago Manufacturing Company, Docket No. 1367."

We apprehend that the Federal Trade Commission case referred to by the District Judge will be relied upon here. That case is reported in Volume 11, Federal Trade Commission Decisions, at page 133. We have been unable to find in that decision the slightest intimation that the parties complained of in that proceeding were representing that the goods sold by them were manufactured *"in free institutions and by skilled*

labor." That proceeding arose from a complaint before the Federal Trade Commission that the Commonwealth Manufacturing Company, largely owned by Harry Dushoff, and Harry Dushoff, doing business under the trade names of Harry Dushoff & Company and Chicago Manufacturing Company, were engaging in unfair trade practices. The complaint was that these concerns were engaged in the sale of binder twine, work shirts and shoes, and that in advertising them they represented that they were the manufacturers of these articles, and that by buying from them the public would save the middleman's profit. It was also charged that the shoes sold by these concerns were branded on the soles with the letters "U. S." in large type, and in smaller type with the words "Munson Army Last," it being claimed that the concerns complained of were thus representing to the buying public that those shoes were made for the United States Army. While it is true the record shows that the respondents in that case purchased the articles sold by them from the State Penitentiary factory at Michigan City, yet the case contains not the slightest intimation that any complaint was made that the concerns were representing that the articles sold by them were manufactured in free institutions and by skilled labor. The Commission held that the advertisement of the concerns that they were the manufacturers of the goods sold, and that purchasers buying from them would be buying direct from the factory had the capacity and the tendency to mislead the purchasers of those articles into the erroneous belief that the concerns were the

manufacturers thereof, and that in purchasing from them the purchasers would be saved the cost and profits of middlemen; and that the misbranding of the shoes had the capacity and the tendency to mislead and deceive the purchasers thereof into the belief that they were buying regular army shoes made for the use of the United States Army.

We therefore submit that neither the record in this case nor the record in the Federal Trade Commission case justifies any inference that there is any practice prevalent among the manufacturers or sellers of convict-made goods of palming off their goods as having been made in free institutions and by skilled labor; and *there is no proof in this record that the convicts employed by plaintiff are not skilled workmen,* nor is there any legal presumption to that effect.

Of course, cases upholding statutes requiring the labeling of products which readily lend themselves to deception, or which are easily capable of adulteration, are not in point here.

POINT 3.

Section 1 of the Act Is Invalid Even if Congress Possesses Power to Require Labeling.

If it be conceded that Congress has the power to require convict-made goods to be so labeled as to conform to the laws of the State of destination, we think this Act must be declared invalid nevertheless. The Act not only operates to require labeling where the laws of the State to which the goods are shipped

require labeling, but it also operates to absolutely prohibit shipment in interstate commerce to those States which prohibit the sale of convict-made goods, if intended to be used in violation of the laws of such States. Section 1 of the Act is prohibitory in character ter and in express language. It unconditionally prohibits shipment in interstate commerce for sale if the State of destination prohibits the sale. It prohibits shipment in interstate commerce for sale without labeling if the law of the State of destination requires such labeling. We think we have demonstrated that Congress is without power to prohibit shipment in interstate commerce of useful and harmless articles of commerce manufactured by prison labor, and the delivery thereof to the consignee, even though the law of the State of residence of the consignee prohibits the sale of such articles. Certainly, however, it was the intention of Congress by Section 1 of this Act to prohibit such shipment, just as much as it was to prohibit shipment without labeling into those States requiring labeling; and it would seem that Section 1 cannot be so dissected as to sustain the provision prohibiting shipment without labeling, and to invalidate the provision prohibiting shipment altogether.

We are informed that at least twenty-two States of the Union have enacted legislation either prohibiting or regulating the sale of convict-made goods, and of those twenty-two States fifteen either prohibit the sale of all or most kinds of convict-made goods. The purpose of the Act here involved was to make those laws effective as against shipments from other States,

and the purpose was to make the laws of each of those States effective, not merely the laws of those States whose regulations stop short of prohibition of the sale of convict-made goods. To so construe Section 1 of the Act as to make it apply to shipments to the seven States regulating the sale of convict-made goods therein by labeling or similar requirements, and not apply to the fifteen States whose laws are prohibitory in character, would not only disregard the plain intent of Congress, but would amount to legislation by the courts, in violation of a thoroughly settled principle of statutory construction. The courts are powerless to so construe the statute as to give it a less scope than was intended by the legislative department. *There is no escape from the proposition that by Section 1 of the Act, Congress intended to close the channels of interstate commerce to convict-made goods intended to be used in violation of the laws of any State, whether those laws merely require labeling before sale, or entirely prohibit sale.* We think, under numerous opinions of this court, Section 1 in its entirety must be stricken down, even though some of its provisions may be within the scope of congressional power.

In the *Employers' Liability Cases,* 207 U. S. 463, the court had under consideration the first Railroad Employers' Liability Act. The court held that that Act upon its face made any common carrier engaged in interstate commerce liable to its employees for injuries or death resulting from the negligence of the company or its employees, irrespective of whether the employee was engaged in interstate commerce at the

time of the injury or not. It was held that Congress does not have the power to legislate on the liability of an interstate carrier for damages not inflicted in interstate activities, or in activities directly affecting interstate commerce; that where the damages are sustained in a purely intrastate activity, the matter is beyond the reach of Congress, and, as the law under consideration made no distinction but was universal in its application, the entire Act must fail.

In the so-called *Trade-Mark Cases,* 100 U. S. 82, there was involved an Act of Congress providing for the registration of trade-marks used in connection with a business and for the protection of the owner of such trade-mark against infringement. The Act by its terms was universal in its application, whether the business in connection with which the trade-mark was used was interstate or intrastate in character. The court held that Congress has no power to provide for the registration and protection of trade-marks used exclusively in intrastate business, and, as the Act covered such trade-marks as well as those used in interstate business, it must fail in its entirety. See also: *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126; *James* v. *Bowman,* 190 U. S. 127; *Illinois Central Railroad Co.* v. *McKendree,* 203 U. S. 514; *United States* v. *Ju Toy,* 198 U. S. 253; *United States* v. *Reese,* 92 U. S. 214; *Baldwin* v. *Franks,* 120 U. S. 678. Some of these cases deal with criminal statutes, but the principle is the same, whether applied to a criminal statute or one dealing with property rights.

POINT 4.

Section 2 Must Fall: First, Because Congress Is Without Power to Require Containers to be Labeled; and Second, Because It Is Not Separable From the Other Provisions of the Act.

We now come to a consideration of Section 2 of the Act, which requires that all containers of convict-made goods shipped in interstate commerce shall be plainly marked on the outside thereof so as to show, among other things, the nature of the contents and the name and location of the prison institution where the goods were produced or manufactured.

It seems quite clear that if Congress does not have the power to require the articles themselves to be marked "convict-made," it is without power to require the containers to be so marked as to indicate that their contents were manufactured by convict labor. Certainly the marking of the containers so as to stamp the contents as convict-made can in no way aid or facilitate movement in interstate commerce. Just as is true of the labeling of the goods themselves, the only purpose served is to publish the fact that the contents are convict-made, and thereby probably affect their salability to certain classes of people.

Putting all this aside, however, it seems to us that Section 2 must be declared invalid under well settled principles of law if Section 1 is held invalid. The Act has only four sections, and contains no separability clause. The general rule is that courts, in construing

legislative enactments, must proceed upon the assumption that the legislature intended the Act to be effective in its entirety. The Act will not be so construed as to eliminate an unconstitutional or otherwise invalid part, and leave in effect the unobjectionable parts, unless it appears to the court from an examination of the Act that legal effect can be given to the unobjectionable part standing alone, and *that the legislature intended the unobjectionable part to stand, even though other parts of the Act should be held invalid; and the presumption is against any such intention on the part of the legislature.* *Williams* v. *Standard Oil Co.*, 278 U. S. 235, at pages 241, 242; *Carter* v. *Carter Coal Co., et. al.*, 298 U. S. 238; *Hill* v. *Wallace*, 259 U. S. 44; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330. Guided by this rule, it seems to us that Section 2 must fall if Section 1 is invalid. How can it be said that it was the intention of Congress that Section 2 shall stand if Section 1 is eliminated? The whole Act proclaims that it was the purpose of Congress not merely to require labeling of the containers of convict-made goods, but to absolutely prohibit shipment of such goods if intended to be used in violation of the laws of the State to which they are consigned. Not only does the context of the Act show this to have been the purpose of Congress, but the title as well. The title reads as follows: "An Act to prohibit the interstate transportation of prison-made products in certain cases." With this declaration of the purpose of Congress in the title, reinforced by the language of

the Act itself, there is simply no escape from the proposition that what Congress had in mind in this legislation was *prohibition of shipments, not labeling of containers.* Undoubtedly, the title of the Act may, and should be, taken into consideration in determining the intent of Congress.

This court stated in the case of *United States* v. *Fisher,* 2 Cranch, 358, 386:

> "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

In the case of *Church of Holy Trinity* v. *United States,* 143 U. S. 457, 462, this court said that while the title of an Act may not be used to add to or take from the body of the statute, yet it "may be considered in determining the intent of the Legislature." See also: *White* v. *United States,* 191 U. S. 545; *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

CONCLUSION.

In conclusion, we respectfully ask the court to contemplate the results which may be expected to flow from sustaining the principle underlying this statute. If Congress can close the channels of interstate commerce to prison-made goods for the purpose of protecting free labor from competition with cheap prison labor, there is no reason why similar legislation, not-

withstanding the case of *Hammer* v. *Dagenhart*, cannot be sustained with reference to the products of child labor. It is generally believed that organized labor receives higher wages than unorganized labor. It is already the policy of the Federal Government to give preference in government contracts for labor or materials to those concerns which recognize the unions and bargain collectively with their men. If this law is upheld, it is only a step further for Congress to prohibit the movement in interstate commerce of articles manufactured by open shop concerns. Every one knows that negro labor and the unorganized white labor of the South, generally speaking, are not as well paid as is organized labor in the East and North. Therefore, on the claim that the products of this cheaper labor unfairly compete with products produced by the higher paid labor of the North and East, the channels of interstate commerce could be closed to the movement of the more cheaply produced articles into unionized territory. Again, should Congress conclude that the closed shop principle is harmful to the public welfare and imposes too great a burden upon the consumer, then, under the principle contended for here, it would seem permissible for Congress to close the channels of interstate commerce to articles manufactured by concerns operated on the closed shop principle. If the principle contended for here is sustained, what is to prevent Congress from closing the channels of interstate commerce to merchandise manufactured in sweat shops and from requiring goods so manufactured to be labeled as having been made in

sweat shops? The eight-hour day has come to be recognized by many States as desirable in many occupations. Under the principle here contended for, Congress could prevent the shipment of articles of commerce from States not observing the eight-hour day into those States which do observe it, on the ground that such legislation would tend to protect labor in those States observing the eight-hour day.

The foregoing are but a few examples of the results which can be expected to logically follow the establishment of the principle here contended for by the supporters of the Act, and it seems to us that they are sufficient to compel its rejection.

Respectfully submitted,

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A. SHELBY WINSTEAD,
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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 138.

KENTUCKY WHIP & COLLAR COMPANY, - Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY, - Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

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November 7, 1936.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

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Petitioner brought action for mandatory injunction to compel respondent to transport prison-made goods in interstate commerce and to procure declaration of rights. Injunction denied because of Ashurst-Sumners Act.

PARTIES AND FACTS 2– 3

Petitioner manufactures leather goods with convict labor. It tendered to respondent twenty-five separate shipments for interstate transportation. Respondent refused each shipment because of non-compliance with Ashurst-Sumners Act.

RESPONDENT'S LEGAL POSITION 4– 5

Respondent refuses to transport convict-made goods in interstate commerce in conflict with Ashurst-Sumners Act unless said Act be declared unconstitutional. Such an Act forbidding transportation of intoxicating liquors was upheld.

Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311.

An Act subjecting convict-made goods upon arrival to the laws of the State of destination was upheld.

Whitfield v. Ohio, 297 U. S. 431.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 138.

KENTUCKY WHIP & COLLAR COMPANY, - *Petitioner,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, - *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

May it please the Court:

This is a proceeding to review a decision of the Circuit Court of Appeals for the Sixth Circuit, affirming a decree of the District Court of the United States for the Western District of Kentucky. The petitioner brought this suit to procure a mandatory injunction compelling respondent to transport prison-made goods in interstate commerce, and to procure a declaration of rights (R., pp. 1-24). The respondent filed a motion to dismiss the bill (R., pp. 24-25). This motion was sustained by the District Judge, although he held the

Ashurst-Sumners Act unconstitutional in part (R., pp. 28-43), 12 F. Supp. 37. This decision of the District Judge, dismissing the bill, was affirmed by the Circuit Court of Appeals; however, the Circuit Court of Appeals held the entire Ashurst-Sumners Act constitutional, 84 Fed. (2d) 168.

PARTIES AND FACTS.

The petitioner is a corporation engaged in the manufacture of leather goods at the Kentucky State Penitentiary situated at Eddyville, Kentucky, a station located on the line of the respondent, Illinois Central Railroad Company. In its manufacturing work, petitioner uses the labor of confined convicts (R., p. 1). The leather goods manufactured are sold in interstate commerce, and petitioner seeks to have its manufactured articles shipped to these other States where its customers are located. In this suit it appears as a shipper or prospective shipper. It offered to respondent interstate shipments including convict-made goods, consigned to twenty-five separate destinations, each in a different State. These shipments are described in petitioner's bill, paragraphs 6 to 30 (R., pp. 4-22).

Respondent is a common carrier, and the only railroad serving the point from which the petitioner ships. It, of course, is willing to carry all lawful shipments offered to it. The shipments involved in this suit were offered to respondent on August 13, 1935. The Ashurst-Sumners Act, prohibiting the transportation of prison-

made goods in interstate commerce, where said goods are to be used in violation of any law of the State to which the goods are consigned, was approved by the President on July 24, 1935.

The shipments described in paragraphs 6 to 15 of the petitioner's bill (R., pp. 4-11) were destined to points in States where the sale of prison-made goods is prohibited. The shipments described in paragraphs 16 to 20 of the bill (R., pp. 11-15) were destined to points in States where prison-made goods are required to be marked so as to show such fact. The shipments described in paragraphs 21 to 30 of the bill (R., pp. 15-22) were destined to points in States which have no laws regulating the sale of prison-made goods. These shipments, however, were not labeled on the outside of the packages offered for shipment, as required by Section 2 of the Act of July 24, 1935.

The respondent recognizes the petitioner's rights as a shipper to have its goods transported, unless such transportation be illegal. It refused to accept each of the shipments proffered, however, because of the provisions of the Ashurst-Sumners Act. Each bill of lading tendered to respondent was endorsed as follows: "Shipment refused because prohibited by Act of Congress approved July 24, 1935."

RESPONDENT'S LEGAL POSITION.

The Act of July 24, 1935, contains penalty provisions. When these shipments were offered, the respondent was faced with possible civil litigation if it refused to transport the shipments. It was also faced with possible prosecutions and penalties if it accepted them. It stands ready to perform its duties, but it maintained at the time these shipments were tendered, and maintains now, that it cannot transport this prohibited merchandise unless the statutory prohibition be declared unconstitutional.

Transportation of intoxicating liquors into prohibition States was, of course, forbidden by the Webb-Kenyon Act. That Act was upheld by this Court. Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311.

Convict-made goods are, by the Hawes-Cooper Act, made, upon arrival, subject to the laws of the State of destination, just as if manufactured there. This Act also has been upheld by this Court. Whitfield v. Ohio, 297 U. S. 431.

The District Court held that the prohibition against transportation of prison-made goods is void. The Circuit Court of Appeals, while it affirmed the District Court, held that this prohibition was valid. The respondent is anxious for a decision by this Court upon the validity of the statute, because it must have a guide to determine whether or not shipments of prison-made goods can be accepted. The particular shipments

offered were not labeled as required by Section 2 of the Ashurst-Sumners Act. Under the decision of the District Court, as well as of the Circuit Court of Appeals, such shipments cannot legally be accepted by a carrier. Upon this point, also, respondent is anxious for a decision as to the validity of the Act.

The respondent's position is clear. It desires to comply with the law. If this Act be held valid, then it must and will refuse to accept shipments prohibited by the Act. If the Act be held unconstitutional, respondent will transport such shipments for the petitioner or any other shipper. We, therefore, await the decision of this Court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 138

KENTUCKY WHIP AND COLLAR COMPANY,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

BRIEF OF AMICI CURIÆ IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

HARRY B. HAWES,
RAYMOND A. WALSH,
BON GEASLIN,
Amici Curiæ.

Counsel for:
Cordage Institute,
The American Federation of Labor,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 138

KENTUCKY WHIP AND COLLAR COMPANY,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

CONSENT TO FILE BRIEF.

Consent of the petitioner in the above entitled cause is hereby granted to Harry B. Hawes, Raymond A. Walsh and Bon Geaslin to file amicus curiæ, a brief in opposition to the petition for writ of certiorari herein.

(Signed) ~~WILLIAM~~ I. DAWSON,
Attorney for Petitioner.

Consent of the respondent in the above entitled cause is hereby granted to Harry B. Hawes, Raymond A. Walsh and Bon Geaslin to file amicus curiæ, a brief in opposition to the petition for writ of certiorari herein.

(Signed) BLAKEY HELM,
TRABUE, DOOLAN, HELM & HELM.

This brief is filed by the undersigned on behalf of the Cordage Institute and the American Federation of Labor, both of whom have an interest in the outcome of this litigation as extensive as the parties thereto.

The Cordage Institute is a trade association composed of the manufacturers of a major percentage of hard fiber cordage and twine products manufactured in private factories in the United States, with plants located throughout the country, and whose investment and whose thousands of employees have been, are, and will continue to be affected by the operation of the Act, the validity of which is here questioned.

The American Federation of Labor, representing the organized working men and women of the United States, has a vital concern in the effect and operation of the Act here questioned, in that it bears directly upon a subject matter of interstate commerce affecting the lives and fortunes of its members.

BRIEF OF AMICI CURIÆ IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Petitioner here seeks a writ of certiorari as set forth in its petition relying upon the point that the Act of Congress, approved July 24, 1935 (49 Stat. 494; 49 U. S. C. A. Secs. 61-64), commonly known as the **Ashurst-Sumners** Act is violative of the Commerce Clause and other provisions of the Constitution of the United States.

OPINIONS OF COURTS BELOW.

The opinion of the District Court of the United States for the Western District of Kentucky (R. 29) is reported in 12 Fed. Supp. 37.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 52) was rendered June 1, 1936 and is reported in 84 F. (2d) 168.

JURISDICTION.

The decree of the United States Circuit Court of Appeals for the Sixth Circuit was entered June 1, 1936 (R. 51). The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, as amended, (Sec. 347, Title 28 U. S. C. A.).

QUESTION PRESENTED.

Whether the Act of Congress entitled "An act to prohibit the interstate transportation of prison-made products in certain cases," approved July 24, 1935, (49 Stat. 494; 49 U. S. C. A., Secs. 61-64), commonly known as the **Ashurst-Sumners** Act, and providing that it shall be unlawful to transport or cause to be transported, goods made by convict-labor into any state where the same are intended to be used or sold in violation of the law of such state, and requiring that packages containing convict-made goods when shipped in interstate commerce be marked to show the name and address of the shipper, the nature of the contents, and the name and location of the institution where produced, is violative of the Constitution of the United States, as exceeding the power of Congress to regulate commerce among the states.

STATUTE INVOLVED.

The Act under attack in this case is set out in full in the petition for writ of certiorari (pp. 2 and 3).

STATEMENT OF THE CASE.

The petitioner brought its bill in the District Court of the United States for the Western District of Kentucky alleg-

ing that it is engaged in the manufacture, with the labor of convicts confined in the Kentucky State Penitentiary at Eddyville, Kentucky, of horse collars and strap goods, and that it has built up a large and valuable business in the sale of such products **to the trade** throughout the United States; that on August 13, 1935, in fulfillment of certain **bona fide** orders theretofore received it tendered to the respondent railroad company several separate shipments of horse collars and strap goods manufactured with prison labor, for the purpose of having the shipments transported to the consignees thereof, each of whom was located in a state other than Kentucky. The respondent company refused to accept said shipments because prohibited by the Act of Congress referred to above.

Several of the shipments tendered were consigned to customers in states whose laws prohibit the sale of any goods, wares or merchandise manufactured or produced, wholly or in part, by convict labor. Certain of the shipments were consigned to customers in states whose laws require that any convict-made goods sold or offered for sale be plainly marked so as to indicate the fact that they are convict-made. The names of these customers would indicate that they are dealers in and resellers of the articles so consigned. Certain of the shipments were consigned to states whose laws impose no restrictions whatever upon the sale of convict-made goods.

There is no allegation in the bill that any of the packages containing said convict-made goods and tendered for shipment were marked as required by Section 2 of the Act.

The petitioner sought a mandatory injunction requiring the railroad company to accept and transport each of the shipments tendered, and to accept and transport all future shipments of a similar character, and an order restraining the railroad company from refusing to accept and transport all shipments of convict-made goods which may be

tendered it by the petitioner, and asked for a binding declaration of rights as between the petitioner and respondent, decreeing and adjudging said Act of Congress to be invalid as violative of the Constitution of the United States (R. 1-23).

A motion to dismiss the bill was filed by the respondent herein, the principal grounds of which were that the bill of complaint set forth no facts which would entitle the plaintiff to the relief sought; that the act of Congress complained of is constitutional and affords no basis for the relief sought by petitioner; and that the bill of complaint on its face shows a lack of equity (R. 24).

By stipulation (R. 25) the case was submitted upon this motion, and a preliminary injunction was issued August 26, 1935 (R. 26).

The facts, as found by the District Court are substantially as alleged in the bill, except that the Court found that the products of the petitioner are not in themselves harmful to the health, peace or good order of the communities into which they are shipped, or in which they are used (R. 41).

Petitioner filed a motion for an additional finding of fact (R. 43) that the articles involved are not in and of themselves, in any particular, harmful to the general welfare of the communities into which they are shipped, which motion was overruled (R. 43).

The District Court found as its conclusions of law that the petitioner had no adequate remedy at law; that the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those states which prohibit the sale or possession of such goods is invalid and beyond the constitutional power of Congress; that the Act in so far as it prohibits the shipment of convict-made goods into states which require that such goods shall be labeled so as to indicate the fact, before being sold or offered for sale, unless such goods are so labeled

before interstate shipment, is a valid exercise of the power of Congress under the Constitution; that Congress has the power to require that the containers of all convict-made goods shipped in interstate ccommerce shall, before shipment, be so labeled as to indicate that the contents are convict-made, together with the name and location of the prison where made; that Section 2 of the Act is separable, valid and enforceable; that the portion of Section 1 which operates to prohibit shipment of unlabeled convict-made goods into those states prohibiting their exposure for sale, or sale, unless so labeled, is separable from the other part of Section 1 of the Act, and is valid and enforceable; that the petitioner did not label the articles tendered to the respondent for shipment to those states requiring convict-made articles to be labeled before sale or exposure for sale; that the respondent was not required to accept such shipments and to transport same to their destination; that the petitioner did not mark any of the containers of any of the shipments enumerated in the bill as required by the Act, and therefore the respondent was not required to accept any of such shipments or transport the same (R. 41-42).

The petitioner's bill was accordingly dismissed at its cost, and the preliminary injunction theretofore issued was continued in force pending an appeal (R. 42). The petitioner appealed to the United States Circuit Court of Appeals for the Sixth Circuit and that Court held the entire Act to be constitutional and affirmed the decree of the District Court dismissing the bill (R. 51). It is asserted by the petitioner that the **Ashurst-Sumners** Act is violative of the Constitution of the United States in that it is not a valid exercise of the power of Congress to regulate commerce among the States; that it contravenes the Fifth and Tenth Amendments to the Constitution of the United States; and that it attempts to delegate to the several

States the prohibition and regulation of interstate commerce.

ARGUMENT.

I.

THE RIGHT OF THE CONGRESS TO PASS LEGISLATION IN AID OF THE ENFORCEMENT OF STATE LAWS IS NO LONGER OPEN TO QUESTION.

This Court recently had occasion to consider the validity of an Act of Congress entitled, "An Act to divest goods, wares and merchandise manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases", approved January 19, 1929 (45 Stat. 1084, 49 U. S. C. A., Sec. 65), known as the **Hawes-Cooper** Act, and the provisions of a statute enacted by the Legislature of the State of Ohio, prohibiting the sale on the open market of that state of convict-made goods. The Act of Congress was sustained by this Court as a proper exercise of the power to regulate commerce among the states, and the statute of Ohio was sustained as a proper exercise of the police power of said state. Whitfield v. Ohio, — U. S. —, 80 L. ed. 527 (Decided March 2, 1936).

Thirty States have enacted legislation regulating the sale of convict-made goods. Twenty-four of these States prohibit such sales, and six States require that such goods, when offered for sale, must be labeled to show the fact that they are convict-made. The **Ashurst-Sumners** Act was enacted to aid those States in the enforcement of their laws respecting the sale of convict-made goods.

The situation which led to the enactment of such legislation was so fully discussed in the briefs filed in the **Whitfield case, supra** that the argument will not be repeated here. The necessity for the statute is amply demonstrated

by the petitioner's bill of complaint by which petitioner indicates that not only has it been engaged in violating valid State laws with respect to the sale of prison-made goods prior to the passage of this Act, but that it expects to continue to do so.

It is significant to note that the District Court in this case recognized the evil inherent in the traffic in prison-made goods and overruled a motion of the petitioner herein for an additional finding of fact to the effect that the articles involved in this controversy are not in and of themselves in any particular harmful to the general welfare of the communities into which they were shipped. The evil resulting from the sale of prison-made goods in competition with goods produced by private enterprise with free labor was recognized by this Court in the **Whitfield** case in the following language:

> "The view of the State of Ohio that the sale of convict-made goods in competition with the products of free labor **is an evil,** finds ample support **in fact** and in the similar legislation of a preponderant number of the other States. Acts of Congress relating to the subject also recognize the evil." (Emphasis ours.)
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>
> "All such legislation, **state and federal,** proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. **A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned,** by non-discriminating legislation, **to preserve its policy from impairment or defeat, by any means appropriate to the end** and not inconsistent with that instrument." (Emphasis ours.)

It would seem unnecessary to review at length the cases in which this Court has held that the Congress may legis-

late to suppress an evil whether that evil results from the inherent nature of the articles sought to be suppressed or from the effect of their use or disposition.

One of the cases illustrating the application of this principle is **Champion v. Ames**, 188 U. S. 321, 47 L. ed. 492, which sustained an act of Congress **prohibiting** the importation into the United States or the transportation from one state to any other state of **"any paper, certificate or instrument"** purporting to be or represent a lottery ticket (28 Stat. 963, Sec. 387, Title 18, U. S. C. A.). The Supreme Court in sustaining this absolute prohibition of interstate commerce in lottery tickets stated:

> "We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states." P. 354, (500).
>
> "If lottery traffic, carried on through interstate commerce, is a matter which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic and simply regulate the manner in which it may be carried on? Or may not Congress, **for the protection of the people of all the states**, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?" P. 355 (501). (Emphasis ours.)

We emphasize that the Court did not base its decision upon the ground that the "paper, certificate or instrument" was **inherently** harmful or deleterious. In fact such article in itself is no more harmful or deleterious than the articles involved in this case. The decision was based upon the fact that many states of the Union had recognized "the evils

that inhere in the raising of money in that mode," and that therefore, the action of Congress

> "only supplemented the action of those states—perhaps all of them—which, for the protection of public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce." P. 358 (502).

The Congress has enacted a statute **prohibiting** the transportation of stolen motor vehicles in interstate or foreign commerce (41 Stat. 324, Sec. 408, Title 18, U. S. C. A.). This act was sustained by this Court in **Brooks v. United States**, 267 U. S. 432, 69 L. ed. 699, although a stolen automobile **per se** is no more harmful than one not stolen, but is merely the instrument by which the evil sought to be abated was accomplished. Mr. Chief Justice Taft, speaking for the Court in that case, stated that:

> "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the **spread of any evil or harm to the people of other states from the state of origin.**" P. 436 (701). (Emphasis ours.)

In the case of **Hippolite Egg Co. v. United States**, 220 U. S. 45, 55 L. ed. 364, it was held to be within the regulatory power of Congress to **prohibit** the transportation in

interstate commerce of adulterated **or misbranded** articles of food. This legislation also was supplementary to legislation which had been enacted in many of the states prohibiting the sale of such adulterated or misbranded articles.

In the case of **Hoke v. United States**, 227 U. S. 308, 57 L. Ed. 523, the prohibition by Congressional enactment, of the transportation in interstate commerce of women and girls for immoral purposes was sustained as a valid exercise of the power vested in Congress to regulate commerce among the states. This statute was in aid of the enforcement of State laws forbidding prostitution, and the same argument was urged against its validity that is being asserted here—that it was an unconstitutional invasion of the rights reserved to the states. But it was pointed out by the Court that:

> "There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; **and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality.** Its exertion does not encroach upon the jurisdiction of the States." P. 321 (527). (Emphasis ours.)
>
> * * * * * * *
>
> "Motives executed by actions may make it the concern of government to exert its powers. Right purpose and fair trading need no restrictive regulation, but let them be transgressed, and penalties and prohibitions must be applied. We may illustrate again by the **pure food and drug act. Let an article * * * be misrepresented by false branding, and Congress may exercise its prohibitive power.**" P. 322 (527). Emphasis ours.)

So it is in this case. The right of the States to prohibit or otherwise regulate the sale of prison-made goods having been established, the exercise by Congress of its power to regulate interstate commerce—a subject-matter which cannot be reached by the States—in such a manner as will aid in the enforcement of State laws, is an argument for, and not against, the validity of this statute.

It makes no difference that some of the states have determined that the general welfare of their citizens will be best served by requiring prison-made goods to be labelled, rather than by prohibiting their sale altogether.

It is a matter of common knowledge and of public record that contracts with prison authorities for the products of prison labor, generally contain a clause that the contractor shall have the right to rescind the contract if Federal or State legislation shall be enacted by which it shall be unlawful to sell or transport prison-made products, or to materially restrict the marketing of such products, **or to require a label showing the origin of such goods.** Such a contract is printed in full in the case of **Rice v. State,** 108 Okla. 4, 232 Pac. 807. Section 8 of the contract furnishes a typical example of such a provision and reads:

> "Sec. 8, This contract shall continue in effect for a period of seven (7) years from and after the date of its execution, provided, however, that in the event of future federal regulation forbidding the transportation of prison-made work shirts in interstate commerce or requiring that such work shirts be labeled to show their source of origin, before being removed in interstate commerce, the Company shall have the right to terminate this contract upon sixty days notice in writing to the Board; and further in the event of any other legislation, state or federal, which the Board in good faith shall find to be unfavorable to the sale or transportation of work shirts sold under this contract, the

company shall have a like right to terminate this contract on like notice."

If there is one proposition of law which is firmly established by the decisions, it is that the freedom of commerce among the States does not demand a recognition of the right to practice a deception upon the public in the sale of any article.

It cannot be urged that by requiring merchandise to be sold for just what it is, and by preventing its sale as something other than it is, a person is deprived of his property without due process of law, for the Constitution does not secure to any one the privilege of representing his goods as the goods of somebody else. This doctrine has been so firmly established and so frequently affirmed by this Court that argument in support of it is no longer necessary. See **Plumley v. Massachusetts**, 155 U. S. 461, 39 L. ed. 223; **Schollenberger v. Pennsylvania**, 171 U. S. 1, 43 L. ed. 49; **Hutchinson Ice Cream Co. et al. v. Iowa**, 242 U. S. 153, 61 L. ed. 217. **Hygrade Provisions Co., Inc., et al. v. Sherman, as Attorney General of the State of New York, et al.**, 266 U. S. 497, 69 L. ed. 402; **Powell v. Pennsylvania**, 127 U. S. 678, 32 L. ed. 253; **Hippolite Egg Co. v. United States**, 220 U. S. 45, 55 L. ed. 364; **State of Wyoming v. W. S. Buck Mercantile Co. et al.**, 264 Pac. 1023, 57 A. L. R. 675.

As was said by the court below, such labeling "merely prevents deceit and gives the public information of value to it, in determining whether or not it desires to purchase and use products manufactured in a penitentiary" (R. 37).

The cases relied upon by the petitioner to support its contention that a State may not require convict-made goods to be labeled are **People v. Hawkins**, 157 N. Y. 1, 42 L. R. A.

490; **Arnold v. Yanders,** 56 Ohio St. 417, 47 N. E. 50, and the **Opinion of Justices of the Supreme Judicial Court of Massachusetts,** 211 Mass. 605, 98 N. E. 334. The decisions in these cases were based upon the proposition that the statutes involved placed a burden upon interstate commerce, and that the silence of Congress upon the subject operated to prevent States from adopting such legislation. It was pointed out in the **Arnold** case, **supra,** that "To give a state legislature power to legislate in such cases, requires an Act of Congress to that effect."

This objection has since been removed by the **Hawes-Cooper** Act, and it can no longer be asserted that Congress may not aid in the enforcement of the policies of those States which have enacted statutes requiring the labeling of convict-made articles.

We submit therefore, that the decision of the Circuit Court of Appeals, sustaining this Act in its entirety, is in absolute conformity with all the decisions of this Court.

II.

THE POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE IS NOT RESTRICTED TO ARTICLES INHERENTLY HARMFUL.

The petitioner asserts that in passing upon acts of Congress completely or partially prohibiting interstate transportation of certain articles the courts have always drawn a distinction between articles which were harmful **per se** and those which were not.

The federal statutes relating to the prohibition of interstate commerce in certain commodities may be divided into two principal classes; first, regulations which involve a complete prohibition of transportation, and second, regulations which involve prohibition only in part, that is, those

which take into consideration the variations in state laws and make provisions in aid of their enforcement.

In the first classification, we find statutes have been enacted prohibiting the interstate transportation of "any paper, certificate or instrument" purporting to be or represent a lottery ticket, prohibiting the transportation in interstate commerce of adulterated or misbranded articles of food, prohibiting the interstate transportation of women and girls for immoral purposes, prohibiting the interstate transportation of stolen automobiles, prohibiting the importation and interstate transportation of prize fight films, and prohibiting interstate transportation of goods, wares and merchandise manufactured or produced by children within the ages specified in the statute.

In the second classification, examples may be found in the **Wilson** Act (26 Stat. 313), subjecting intoxicating liquor imported into dry states to the operation and effect of the laws thereof; the **Oleomargarine** Act (32 Stat. 193), subjecting oleomargarine transported into a state to the operation and effect of the laws thereof; the **Lacey** Act (31 Stat. 187), making the same provisions with respect to the dead bodies of game birds and game animals, and in addition, prohibiting the transportation of such birds and animals out of any state where they had been taken or shipped in violation of the laws; the **Webb-Kenyon** Act (37 Stat. 699), prohibiting the transportation of intoxicating liquors into any state where they are intended to be used in violation of the laws; the **Reed** amendment (39 Stat. 58), prohibiting the ordering, purchasing, or transportation in interstate commerce (except for certain specified uses) of intoxicating liquors into states, the laws of which prohibit the manufacture or sale therein of such liquors; the **Hawes-Cooper** Act, subjecting prison-made goods transported into any state to the operation and effect of the laws thereof; and the **Connally** Act of February 2, 1935 (49 Stat. 30), prohibiting the

Act of February 2, 1935 (49 Stat. 30), prohibiting the transportation out of any state of oil produced in violation of its laws.

It is significant to note that in only one instance has the Supreme Court declared a statute within the first classification to be unconstitutional. This was the **Child Labor** Act (39 Stat. 432), which was invalidated by this Court in **Hammer v. Dagenhart**, 247 U. S. 251, 62 L. ed. 1101.

It is even more significant to note that in no case has the Supreme Court declared a statute of the second classification to be unconstitutional. The statute here clearly falls within the second category, since the prohibition is effective only where the State of destination prohibits the sale or requires the labeling of prison-made goods.

And the significance of these decisions further increases when it is recalled that the **Child Labor** statute is the only one of either classification which did not purport to have been enacted by the Congress in aid of the enforcement of State legislation theretofore enacted.

The basic principle underlying the decision upon each of those statutes was that while the articles themselves (whether intoxicating liquor, game birds, stolen automobiles, or lottery tickets) might not be inherently harmful, the traffic in such articles resulted in evils antagonistic to the general welfare, and therefore, the States might prohibit, or otherwise regulate such traffic, and the Congress might legislate to prevent the use of interstate commerce in the violation of state laws.

In other words, the test of the power is found, not in the inherent nature of the articles themselves, but in the effect the business of dealing in such articles has upon the public weal. This principle was clearly recognized in the **Child Labor** case where this Court said that the decisions establishing the validity of regulatory statutes which prohibited interstate transportation of certain articles "rest upon

the character of the particular subjects dealt with, and **the fact that the scope of governmental authority**, State or national, **possessed over them is such**" that the regulation made in each instance was justified. (Emphasis ours.)

And as was stated by this Court in **Hebe Company v. Shaw**, 248 U. S. 297, 303, 63 L. ed. 255, 259:

> "If the character or **effect of the articles as intended to be used** 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.'" (Emphasis ours.)

Such a clear distinction exists between the **Child Labor** statute and the one under consideration here that it would seem to require no argument to show it. The **Child Labor** statute was declared to be unconstitutional on the ground that the prohibition of interstate transportation of products manufactured by child labor constituted an attempt to coerce the **manufacture of commodities in accordance with regulations and standards prescribed by the Congress**, regardless of the laws regulating the labor of children in either the State of origin or destination. The present statute, as we have pointed out, is a measure regulating the transportation and sale of prison-made goods, and is intended to prevent the evils resulting from the sale of prison-made goods in violation of valid laws in the State of destination.

In view of the decisions, therefore, we submit that the Act here is a valid exercise of the power of Congress to regulate commerce among the states.

III.

CONGRESS HAS THE POWER TO REQUIRE THE LABELING OF ALL PACKAGES OF CONVICT-MADE GOODS SHIPPED IN INTERSTATE COMMERCE.

Section 2 of this Act requires that all packages containing any convict-made goods, where transported in interstate commerce, be plainly marked to show the name and address of the shipper, the nature of the contents, and the name and location of the penal or reformatory institution where produced. But it is urged by petitioner that the Congress does not have power to require that shipments of convict-made goods be so marked.

In other words, the whole argument of the petitioner is to the effect that while Congress has the power to regulate commerce in articles produced by free labor and by private enterprise, it has no authority to place any restraint upon the traffic in the products of human misfortune, even to the extent of requiring honest dealing in such products; that the only authority Congress has with reference to these commodities is to remain silent, since if Congress acts at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

In answer to this it is only necessary to cite the language of this court, in the case of **In re Rahrer**, 140 U. S. 545, 562, 35 L. ed. 572, 577:

> "We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent.
>
> "The framers of the Constitution never intended that the legislative power of the Nation should find itself incapable of disposing of a subject matter specifically committed to its charge."

The language of this section follows very closely the language found in Section 393 Title U. S. C. A. (31 Stat. 188) which relates to packages containing the dead bodies of game animals and birds, the constitutionality of which has been determined. **Rupert v. United States**, 181 Fed. 87; **LaCoste v. Department of Conservation of State of Louisiana**, 263 U. S. 544, 68 L. ed. 437.

A similar statute relating to the marking of packages shipped in interstate commerce and containing intoxicating liquors (Sec. 390, Title 18, U. S. C. A.), has also been sustained. **United States v. Freeman**, 239 U. S. 117, 60 L. ed. 172; **One Truck Load of Whisky v. United States** (C. C. A. Ohio), 247 Fed. 99. The validity of this section, therefore, is firmly established.

IV.

THE LANGUAGE OF THE ACT HERE UNDER CONSIDERATION HAS BEEN CONSTRUED TO BE A PROPER REGULATION OF INTERSTATE COMMERCE.

This Court in the case of **Whitfield v. Ohio, supra**, held:

> "That act (the Hawes-Cooper Act) is in substance the same as the Wilson Act with respect to intoxicating liquors, passed August 8, 1890, c. 728, 26 Stat. 313, as construed and upheld by this Court. **Rhodes v. Iowa**, 170 U. S. 412, 421-423, 426; **In re Rahrer**, 140 U. S. 545, 559-560, 562, 564."
>
> . . . . . .
>
> "If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is clear

that the removal of that impediment in the case of prison-made goods **must be upheld for reasons akin to those which moved this Court to sustain the validity of the Wilson Act.**" (Emphasis ours.)

* * * * * * *

"3. That the Hawes-Cooper Act does not constitute a delegation of Congressional power to the States is made clear by **In re Rahrer, supra,** pp. 560-561, and by what we have already said under subdivision 2."

The **Ashhurst-Sumners** Act is in substance the same as the **Webb-Kenyon** Act with respect to intoxicating liquors, which was upheld in the case of **Clark Distilling Company v. Western Maryland Railroad Company,** 242 U. S. 311, 330, 61 L. ed. 332, 340. In that case the Court said:

"**As the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other,** we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity—a result which, as we have previously said, would reverse Leisy v. Hardin and overthrow the many adjudications of this court sustaining the Wilson Act." (Emphasis ours.)

Therefore, the Congress in adopting the language used in the earlier Act must be considered to have adopted also the construction given such language by this Court and to have made it a part of the enactment. **Hecht v. Malley,** 265 U. S. 144, 68 L. ed. 949.

CONCLUSION.

We submit, therefore, that the decisions of this Court are conclusive as to the validity of the statute here under attack, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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Amici Curiæ.

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CHARLES ELMORE

United States Supreme Court

OCTOBER TERM, 1936.

No. 138.

KENTUCKY WHIP AND COLLAR COMPANY,
Appellant,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF APPEALS,
SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF and BRIEF FOR THE STATE OF NEW YORK, APPEARING HEREIN AS AMICUS CURIAE.

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BATAVIA TIMES, LAW PRINTERS,
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United States Supreme Court

OCTOBER TERM, 1936.

No. 138.

KENTUCKY WHIP AND COLLAR COMPANY,

Appellant,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellee.

Now Comes the State of New York by its Attorney General, John J. Bennett, Jr., and Henry Epstein, Solicitor General, Counsel, and asks leave to file its brief *amicus curiae* in the above appeal.

The State of New York has at present its own statute (Sec. 69, General Business Law, Ch. 26, Laws 1933) whose enforceability may rest in large measure on the outcome of this appeal.

Date: Aug. 3, 1936.

Yours, etc.,

JOHN J. BENNETT, JR.,
Attorney General,
State of New York,
Albany, N. Y.

HENRY EPSTEIN,
Solicitor General,
Counsel.

UNITED STATES SUPREME COURT

OCTOBER TERM, 1936.

No. 138.

KENTUCKY WHIP AND COLLAR COMPANY,
Appellant,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

BRIEF FOR THE STATE OF NEW YORK, APPEARING HEREIN AS AMICUS CURIAE.

Statement.

The State of New York begs permission to file this memorandum as a friend of the Court, on the ground that it has a statute (General Business Law, Sec. 69; Laws of 1933, ch. 26) forbidding utterly the sale in the State of New York of any convict-made goods, wares or merchandise, except to the State or any political division thereof, and that if the Federal statute in question is held to be invalid and is not enforced, the State of New York, and other States similarly situated, will suffer serious and irremediable loss to property and rights, and their lawful and constitutional legislative policy will be set at naught.

The theme of this argument is the power of Congress to aid in the enforcement of State laws through its regulatory powers over interstate commerce, under Article I, Section 8, clause 3, of the United States Constitution, providing that "the Congress shall have power . . . to regulate commerce with foreign nations, and among the several States."

The conclusion of this argument is that where State laws are within the sovereign power of the State to enact, no constitutional provision exists to bar Congress from contributing to the support thereof; and specifically, that a Federal statute *(i. e.,* the so-called Ashurst-Sumners Act, July 24, 1935, ch. 412; 49 Stat. Secs. 1-4; U. S. C. A. title 49, Secs. 61-64) violates no constitutional provision in

(a) prohibiting the transportation of convict-made goods, wares and merchandise into any State where they are intended to be received, possessed, sold or used, either in the original package or otherwise, in violation of any law of such State, and

(b) in providing that all packages containing such convict-made goods, wares and merchandise, when shipped or transported in interstate or foreign commerce, shall be plainly marked to show, among other things, the name and location of the penal institution where produced.

The plaintiff herein manufactures horse collars and strap goods in the Kentucky State penitentiary, with convict labor, and has marketed its products throughout the States of the Union. In its bill in equity it alleged that it had delivered to the defendant railroad company certain of its prison-made goods, not marked or labeled as such, for shipment to customers (a) in certain States

which by their laws prohibit the sale of such goods, (b) in certain States which by their laws require prison-made goods to be labeled as such, and (c) in certain States which have no laws on the subject; and that the defendant refused to accept any of the shipments and transport the same, endorsing upon the bills of lading the following: "Shipment refused because prohibited by Act of Congress approved July 24, 1935."

The said Act is the so-called Ashurst-Sumners Act, containing the provisions relating to prison-made goods set forth above.

The case was submitted upon the plaintiff's motion for a perpetual injunction and the defendant's motion to dismiss the bill. The District Court, dismissing the plaintiff's petition but continuing the temporary injunction pending appeal, held in substance that the Federal statute's prohibition of the shipment of prison-made goods was unconstitutional and void, but that the provision requiring the labeling of all convict-made goods in interstate commerce was valid.

In the interest of terseness it may be said at once that we concur in and approve the District Court's decision as to the labeling provision and would support it on more extensive grounds than the learned trial judge has adduced in his opinion. But consideration of constitutional principles and decisions constrains us to protest emphatically against the District Court's reasoning and conclusion upon the prohibition of the interstate carriage of convict-made commodities.

The Circuit Court of Appeals (6th Circuit) has sustained the statute in its entirety as a valid regulation of interstate commerce. The substance of the opinion is that the statute at bar bears the same relation to the

Hawes-Cooper Act (sustained by this court) as the Webb-Kenyon law bore to the Wilson Act (*Clark Distilling Co. v. Western Ry. Co.*, 242 U. S. 311). With the determination of the Circuit Court of Appeals we agree. The judgment should be affirmed.

Historical Background (Statutes and Decisions.)

A very brief summary of the factual background may be helpful. For about 100 years many of the States have been wrestling with the problem of the competition of convict-made goods with the products of free labor. The evil effects of such competition, always notorious, have become calamitous during recent times. In some States, after numerous experiments, means were found to keep the products of a State's own prisons off the open market, but there was no way, without Federal assistance to prevent the influx of convict-made goods from other States.

Action under the Commerce Clause was the evident remedy, and continuously from 1909 to 1929 measures to this end were before the Congress, three times passing the House of Representatives in that period, and culminating in the so-called Hawes-Cooper Act of January 19, 1929 (U. S. C. A., title 49, "Transportation," section 65), in substance taking all goods, wares and merchandise produced by convicts, and transported into a State, out of interstate commerce, and making them subject to State laws, upon their arrival and delivery within a State.

The Hawes-Cooper Act did not become effective until January 19, 1934, and by that time twenty-two States, with population of 75,000,000, had passed legislation prohibiting the sale on the open market of convict-made

goods. The constitutional validity of the Hawes-Cooper Act has been sustained in the New York Supreme Court by Mr. Justice Loughran (now of the New York State Court of Appeals) in *Greenthal v. Bennett;* by the Ohio Court of Appeals, Eighth Appellate District, in *Whitfield v. Ohio;* by the Supreme Court of Wisconsin, in *State v. Whitfield,* 257 N. W. 601; and by the Supreme Court of Ohio, in *Whitfield v. Ohio,* affirmed by this Court, and the United States Supreme Court, in *Alabama v. Arizona* (1934), 291 U. S. 286, upheld the dismissal of plaintiff State's bill against five other States, praying that the laws of those States forbidding sale of convict-made goods be declared invalid. The bill was held to be multifarious, and lacking in equity for failure to show imminent injury and lack of adequate remedy at law.

Still the demoralizing evil has only been scotched, and an illuminating parallel may be noted in that just as the Wilson Act (August 8, 1890; U. S. C. A., title 27, sec. 121), taking intoxicating liquors out of interstate commerce upon their arrival within a State, was found to require as an essential complement the Webb-Kenyon Act (37 Stat. 699; 1915; U. S. C. A., title 27, Sec. 122), and the Reed amendment prohibiting the transportation of liquor into a State where the sale or use thereof was in violation of the State law, before its aim could be effected, so the Hawes-Cooper Act, following virtually verbatim as to prison-made goods the Wilson Act as to liquor, has been reinforced by the measure now under discussion, the Ashurst-Sumners Act, the language of which is substantially identical, as to the transportation of prison-made goods into States where they are to be used in violation of a State law, with that of the Webb-Kenyon Act dealing with intoxicants.

Careful study of congressional enactments, checked with the judicial interpretations, makes it clear that for fifty years or more the exercise by Congress of its regulatory powers under the Commerce Clause has kept pace, step by step, with the development of needs for the use thereof, and has occupied at any given time a field as wide in all dimensions as that of the public welfare. Where public welfare has been best served by measures solely Federal, such measures have been adopted. Where States could act unaided to good purpose, they have been encouraged and their actions approved. Where a combination of State and Federal activity has been indicated as essential or desirable, cooperation has always been forthcoming.

In the exercise of its powers of regulation under the Commerce Clause, Congress is limited by no rule more definite than that any means appropriate to lawful ends may be employed (*McCulloch vs. Maryland,* 4 Wheat. 316, 421). This power does not stop at State lines. It must of necessity be exercised within the territorial jurisdiction of the States. It is the power to regulate, the power to prescribe the rule by which commerce shall be governed. It is vested in Congress, is complete in itself, and may be exercised to its utmost extent, for it has no limitations beyond those found in the Constitution (*Gibbons v. Ogden,* 9 Wheat. 1).

But in such exercise Congress has chosen to use four principal methods, with several combinations thereof, never hesitating at any point to interfere with intrastate transactions when such interference was essential to the fulfillment of an interstate purpose.

These principal methods have been:

1. *The requirement of branding or labeling.*
2. *Prohibition of interstate transportation.*

3. *Divesting commodities of their interstate character upon their arrival and delivery within a State where their sale and/or use was unlawful under State law.*

4. *Prohibition of the interstate transportation of commodities into States where their sale and/or their use would be unlawful under State law.*

The principal combinations of these methods have been:

1. *Both* the requirement of branding or labeling and the prohibition of interstate transportation when not correctly marked.

2. *Both* the requirement of branding or labeling and the divestment of the interstate character of the commodity upon its arrival and delivery within a State where its sale and/or use was unlawful under State law.

3. *Both* the prohibition of interstate transportation and the divestment of interstate character upon arrival within a State where sale and/or use would be unlawful.

Summarizing briefly, the classic example of branding or labeling (par. 1 above) is the Pure Food and Drugs Act of 1906 (U. S. C. A., title 21), covering not only foods and drugs, but tea, filled milk, animals, meats, meat and dairy products and viruses, serums, toxins, antitoxins, etc., with which should be considered the provisions of the Internal Revenue legislation, scattered through title 26 of the U. S. C. A., affecting snuff, cigars, cigarettes, tobacco, oleomargarine, adulterated butter, filled cheese, wines, etc., and those relative to gold and silver articles (15 U. S. C. A., secs. 295 *et seq.)*, intoxicants (18 U. S. C. A., sec. 390), patented articles (35 U. S. C. A., sec. 50), and the like.

The prohibition of interstate transportation (par. 2 above) has found expression with reference to insect pests and their eggs (U. S. C. A., title 7, "Agriculture,"

sec. 141) and in numerous provisions of the Criminal Code in title 18 of U. S. C. A., "Crimes," all the way from the prohibition of the transportation of high explosives (sec. 384), condemned carcasses, lottery tickets, obscene literature (1895, secs. 387, 396), of women for immoral purposes (1910, secs. 397-400), films of prize fights (1912, sec. 405), stolen motor vehicles (1919, sec. 408), down to kidnapped persons (1932, sec. 408-a).

The sterling instance of the divestment of a commodity's interstate protection upon its arrival within a State where its sale and/or use would be unlawful under State enactments (par. 3 above) is the Wilson Act of 1890 (27 U. S. C. A., "Intoxicating Liquors," sec. 121), providing that intoxicants transported into any State for use or sale should upon arrival be subject to any law of the State, enacted in the exercise of its police powers, to the same extent and in the same manner as though the liquor had been produced in such State, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise. Concomitant therewith is the Hawes-Cooper Act (49 U. S. C. A., "Transportation," sec. 65) making as to convict-made goods the same provisions as those of the Wilson Act in regard to intoxicants, with the omission of the reference to the police powers of a State.

Coming then to paragraph 4 above—the prohibition of interstate transportation of a commodity into a State where the sale and/or use thereof would be unlawful under State enactments—the immediate reference is to the so-called Webb-Kenyon Act (1913, 27 U. S. C. A., sec. 122), which was found necessary to the support of State prohibition laws, since the Supreme Court had held in *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, that it was still possible for individuals in States to order and re-

ceive liquor transported to them. And just as this situation developed with respect to intoxicants, it has been found necessary, as to convict-made goods, to add to the Hawes-Cooper Act, above referred to, which divests such goods of their interstate protection upon their arrival within a State where their sale is unlawful, the Ashurst-Sumners Act (49 U. S. C. A., "Transportation," secs. 60-64), which makes unlawful the interstate transportation of convict-made goods into a State where their sale would be unlawful under State enactments.

Completing the references just made, it may be noted that instances in which Congress has *both* required branding or labeling, and prohibited interstate transportation of goods not properly marked, include dairy products (21 U. S. C. A., sec. 16) meat or meat food products (21 U. S. C. A., sec. 78) and game animals or birds (18 U. S. C. A., sec. 393); and *both* branding or labeling and the divestment of the interstate character of the commodity upon its introduction into a State where its sale would be unlawful have been imposed as to game animals or birds 18 U. S. C. A., sec. 395), and gold or silver articles (15 U. S. C. A., sec. 300); while *both* the prohibition of interstate transportation and the application of State laws upon arrival within a State where sale would be unlawful, as well as proper marking or labeling, are provided for as to insect pests, plants and nursery stock (7 U. S. C. A., secs. 141, 158, 166).

I.

The Ashurst-Sumners Act is a Valid Exercise of the Congressional Power to Regulate Commerce Interstate.

It is, of course, unnecessary to present in detail the foundations of this congressional power to regulate. The

power is plenary, comprehending all commercial intercourse between different States and all the component parts of that intercourse, including the purchase and sale of the commodities transported (Dahnke-Walker Co. v. Bonduvant, 257 U. S. 282), and is not to be denied or thwarted by the commingling of interstate and intrastate operations (Minnesota Rate Cases, 230 U. S. 352). Its existence is obvious, and needs no argument. What matters here is that this power has been exercised in aid of the general welfare, and specifically in cooperation with and support of the attempts of various States to cope with evils confronting them; that such exercise of such power has had judicial approval; and that it has frequently been exercised, with such approval, without regard to whether or not the regulation affected articles or commodities which were harmless in themselves.

This is a point of much significance, inasmuch as the learned Court below has held that no power exists, either Federal or State, to prohibit "the shipment of labeled convict-made goods," since they are "legitimate objects of trade."

The instances of lottery tickets, meat and dairy products, game animals and birds, gold and silver articles, films of prize fights, stolen motor vehicles, and kidnaped persons come at once to mind. It is absurd to attribute to any of these a quality intrinsically harmful, injurious or deleterious. It is the use to which they are put, the effect of their transportation upon the public welfare, that gives rise to the harm which Congress has sought to prevent and which the Court has recognized.

Of late there has been confirmation and acceptance in the Supreme Court of the fine attitude expressed by Mr. Justice Holmes in his dissenting opinion in the Child Labor case *(Hammer v. Dagenhart,* 247 U. S. 251, 281)

when he indicated that evil may be found, not merely in the quality of a thing, but in the use to which it is put; and evil may also be found in a thing which in itself is good, because of the manner of its production. So one with a fine moral sense may prefer not to use a thing, good in itself, for the purpose of discouraging an evil method of production.

And, arguing that Congress might well prohibit the interstate transportation of goods when such interstate transportation is an aid to an evil in the sale, or an evil in the production, Mr. Justice Holmes said, in words fully applicable to the present issue:

> "The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy, whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States, which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the Nation as a whole. If, as has been the case within the memory of a man still living, a State should take a different view of the propriety of maintaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames* (188 U. S. 321). Yet in that case it would be said with quite as much force as in that that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may re-

quire a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command."

It is realized that these words were contained in a dissenting opinion. Yet the true force of even the majority's views in *Hammer v. Dagenhart* was not adverse to the contention we offer herein, as will presently be shown, and the essential position of Mr. Justice Holmes in that case has since had thorough vindication in *Brooks v. United States*, 267 U. S. 432, in which he upheld the constitutionality of the Federal statute forbidding the transportation in interstate commerce of an automobile known to have been stolen, the Court saying:

"Congress can certainly regulate interstate commerce to the extent of *forbidding* and punishing *the use of such commerce as an agency* to promote immorality, dishonesty, or *the spread of any evil or harm to the people of other States from the State* of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce." (Italics supplied.)

Yet a motor vehicle, as well as a lottery ticket, is harmless in itself. An even more striking judicial parallel to the present matter is afforded in the legislation affecting the dead bodies of game animals and birds. Far from being obnoxious, evil, or harmful in themselves, these commodities are wholesome articles of food. Yet State game laws regulate possession thereof, and a Federal statute (18 U. S. C. A., §§ 393, 395; the so-called Lacey Act) requires labeling or marking, forbids both shipper and carrier to transport bodies of animals or birds killed in violation of local laws, and, in the language of the Wil-

son Act as to intoxicants and the Hawes-Cooper Act as to convict-made goods, subject such dead animals or birds to the laws of any State upon their arrival in such State.

Congress asked in this matter to validate State attempts to enforce their conservation laws, quite as in the Wilson Act it sought to help the States to enforce their liquor laws, and in the Hawes-Cooper Act and the Ashurst-Sumners Act now under discussion it has designed to aid them in the enforcement of their statutes affecting convict-made goods. The history of the legislation and decisions is illuminating on the present questions.

In *Phelps v. Racey,* 60 N. Y. 10 (1875), the Court of Appeals sustained a State statute making unlawful the possession of game out of season. Congress had not asked, and there was held to be no interference with commerce (citing the *License cases,* 5 How. 504). But, the force of this decision having been weakened by the line of cases represented by *Bowman v. Chicago Railway,* 125 U. S. 507; *Leisy v. Hardin,* 135 U. S. 100, etc., the Court of Appeals held, in *People v. Buffalo Fish Co.,* 164 N. Y. 93 (1900), where the fish in question had been brought in from Canada, that the doctrine of the *License cases,* that a power granted to Congress but not exercised nor forbidden to the States was dormant and could be exercised by the States within their sphere, had been overruled, and that so far as the State law attempted to regulate commerce in articles brought from without the State, it interfered with the congressional power to regulate interstate and foreign commerce and so was invalid.

There was rigorous dissent by Judges Gray, Haight and Martin, and in part by Judge Werner. It may be noted, too, that in upholding the Wilson Act *In re Rahrer,* 140 U. S. 545, the Supreme Court went to the *License*

cases for the distinction between the incidental regulation of interstate commerce admissible under the reserved police power of the States and the power of commercial regulation delegated to Congress.

Following the *Buffalo Fish Co.* decision, Congress enacted the Lacey Act, subjecting dead birds, animals brought into a State to the laws of such State upon arrival therein. Subsequently, but before the effective date of a New York statute of 1902, specifically referring to game from outside the State, the question arose again in *People v. Bootman,* 180 N. Y. 1, when the Court of Appeals held that the Lacey Act did not of itself extend the New York law to the possession of game taken in other States, but ruled that, as to cases arising after the 1902 amendment, the Lacey Act had removed all doubts and had taken the question of interstate commerce out of the picture.

In *Silz v. Hesterberg,* 184 N. Y. 126 (1906), the Court of Appeals held that the Lacey Act directly authorized the exercise by the State of the police power and was a proper enactment validating the State law prohibiting the possession of game out of season, whether taken from within or without the State. It upheld the exclusion of foreign game as a protection of domestic game on the ground that it was the uniform belief of Legislatures and the people that it afforded such protection, noting "that Congress can authorize an exercise of the police power by a State, which without such authority would be an unconstitutional interference with commerce has been expressly decided by the Supreme Court of the United States in *Matter of Rahrer,* 140 U. S. 545."

In the United States Supreme Court, 211 U. S. 31 (1908), the *Hesterberg* case was affirmed. The challenge to the Fourteenth Amendment and the Commerce Clause

was not sustained. The Court held that the Lacey Act was valid as a regulation of interstate commerce, noting that "the New York Court of Appeals further held that the so-called Lacey Act relieved the regulation of the objection in question because of the consent of Congress to the passage of such laws concerning such commerce, interstate and foreign, within the principles upon which the Wilson Act was sustained by this Court;" and further that, independently of the Lacey Act, the State law was a proper exercise of the police power of the State, on the ground that a police measure within the power of the State will not be held bad because it incidentally and remotely affects interstate commerce. The Court reviewed *Plumley v. Massachusetts,* 155 U. S. 461, 473, and *Missouri Kansas Railway v. Haber,* 169 U. S. 613; *Geer v. Connecticut,* 161 U. S. 519. Still further on this point it said:

> "Subject to constitutional limitations, the Legislature of the State is authorized to pass measures for the protection of the people of the State in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted."

This principle, we apprehend, supports the contention that *the mere existence of police power in the State to regulate a given subject matter is sufficient to authorize regulatory measures by Congress of the type of the Wilson Act, the Webb-Kenyon Act, the Lacey Act, the Hawes-Cooper Act and the Ashurst-Sumners Act.* That the Webb-Kenyon Act and the Ashurst-Sumners Act add a prohibition of interstate transportation into a State where sale or use is unlawful to the provisions of their respective companion-laws, the Wilson Act and the Hawes-Cooper Act, which relieve commodities of their

interstate nature upon their arrival within a State, is a difference in degree and not in kind, in remedy and not in doctrine. The purpose dominating all these enactments is *to prevent the exclusive power of Congress over interstate commerce from providing a shield behind which to carry on that which the State may validly declare unlawful or injurious.*

That the State's police power does exist in the present circumstances we do not understand to be questioned. If the validity of a State law were alone at issue, it would have to be presumed that the Legislature knew public policy and the needs of the State, that it enacted the law for the promotion of the better order, safety, health, morals, prosperity and general welfare, and judicial inquiry would be limited to determining whether the particular regulation was appropriate to the statutory purpose and was not arbitrary, discriminatory or unreasonable *(Nebbia v. New York,* 291 U. S. 502), while even under this limitation the Legislature, in the words of Mr. Justice Holmes in *Central Lumber Co. v. South Dakota,* 226 U. S. 157, "may direct the laws against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

But there is involved primarily the validity of an Act of Congress designed in aid of State enactments aimed at evils which, without the Federal cooperation, cannot be coped with.

If the State and Congress, working to the same end, have the power to cooperate so as to enforce fish and game laws, the State declaring its policy through its own statutes, and Congress removing by Federal law the

interferences which might arise through the implications of the Commerce Clause, how much greater must be the power to protect free labor from unjust and ruinous competition.

There is nothing inherently bad or dangerous to health, morals or safety in a bird, or deer, or any other animal merely because it is shot in another State. It may be in season in the State where it is taken and out of season in the State to which it is transported. A fish caught in the waters of one State or country is no worse for eating purposes than one caught in another jurisdiction. But can it be that a State has the power to conserve its food supply, and Congress has the power to waive the restrictions of interstate commerce in aid of that purpose, while they are without the power to protect their people in their prosperity and their right to work in order that they may obtain and use that food supply?

Is it not a function of government to preserve the freedom of labor? "There is no more important concern", it has said, "than to safeguard the freedom of labor, upon which alone can enduring prosperity be based." *(Bailey v. Alabama,* 219 U. S. 219.) There is no fact more obvious than that from a social and economic standpoint the sale in the open market of goods made by prison labor is detrimental to the prosperity and welfare of the State and destructive of the peace and good order of the people. The enormous extent to which this demoralizing traffic has invaded free markets and has taken down wage rates and living standards is a matter of common knowledge. We feel that judicial notice will surely be taken of the notorious facts, and moreover of the established national policy against these conditions, reflected in numerous appropriation bills and

tariff acts, in the Reconstruction Finance Corporation Act, the National Industrial Recovery Act, and the State laws governing more than 75,000,000 of our people.

From what has been cited herein it appears that the constitutional argument for the validity of the Wilson Act, the Lacey Act and the Hawes-Cooper Act, all of which removed certain commodities from the status of interstate commerce upon their arrival within a State, has turned upon the Supreme Court's reasoning in *In re Rahrer,* 140 U. S. 545, in which that Court upheld the Wilson Act, holding that the act was not an attempt to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws, but that Congress "has taken its own course and made its own regulation, applying to those subjects of interstate commerce one common rule, whose uniformity is not affected by variations in State laws in dealing with such property." And further:

> "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge. * * * Congress did not use terms of permission to the State to act; but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

To this view of the Wilson Act, which it seems clear could be applied with but slight change in wording and no alteration of thought to a Federal statute prohibiting interstate commerce from the point of inception, instead

of removing articles from such commerce upon arrival at their destination, should be added the fact that when the Webb-Kenyon Act, which did take that one step further and did make that prohibition of the interstate transportation of a commodity from the point of inception, came before the Supreme Court in *Clark Distilling Co. v. Western Maryland Railroad Co.*, 242 U. S. 311, the Court followed right along, and sustained the Webb-Kenyon Act, on the specific ground that such a conclusion was the *express* result of the Rahrer case, saying:

> "As we have already pointed out, the very regulation made by Congress in enacting the Wilson law to minimize the evil resulting from violating prohibition of State law by sending liquor through interstate commerce into a State, and selling it in violation of such law, was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from State authority which otherwise would have obtained. And that Congress had the right to enact this legislation making existing and future State prohibitions applicable was the express result of the decided cases to which we have referred, beginning with *Re Rahrer*, 140 U. S. 545."

We are aware that in one or two decisions affecting interstate transportation the Supreme Court has used words which, it may be claimed, would limit the scope of the power of Congress. Thus, in the *Clark Distilling Co.* case, fears having been expressed by counsel that to sustain the Webb-Kenyon Act would open the door to unpredictable abuses, the Court said that the "exceptional nature" of the subject there regulated *(i. e.*, the transportation of intoxicants into States which prohibited their sale or use) "affords no ground for any fear that such power may be constitutionally extended to things

which it may not, consistently with the Constitution, embrace." And in the *Child Labor* case *(Hammer v. Dagenhart,* 247 U. S. 251, 271) the Court, referring to the liquor regulation and to the Mann Act *(Caminetti v. United States,* 242 U. S. 470) said: "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended."

No claim that Congress lacks power to deal with interstate transportation of convict-made goods may be fairly based upon such utterances.

(a) It was not intoxicating liquors which were referred to in the *Clark Distilling* case as of a nature so exceptional as to warrant an exceptional power. On the contrary the "exceptional" element was the *transportation* of intoxicants into States *which prohibited their sale or use.* Certainly, though convict-made goods themselves may be intrinsically harmless, or even useful, their transportation into States which forbid their sale or use is an evil of a grossly exceptional sort, with which Congress, on the basis of this decision, has ample power to deal by forbidding such transportation.

The labor which produces convict-made goods is not free labor, and there are in such labor no inherent rights of men which are subject to the normal protection of the Constitution. The provisions against deprivation of life, liberty, or property, found in the Fifth and Fourteenth Amendments, do not preserve for the convict any liberty to contract, or any right of property in his labor or the products of his labor, and other persons cannot contract with the convict for his labor and thereby acquire rights

of property. We have in the Constitution a direct provision against involuntary servitude. We have a public policy against anything in the nature of slave labor. That being so, it is clearly within the province of Congress to protect commerce from any evil that might come into commerce through the use of the products of labor produced under involuntary servitude, not necessarily because the article itself is a dangerous thing, but because the use of the article necessarily aids in the carrying out of an evil thing, the doing of an evil act, in this instance the crushing of free labor in industry.

In other words, it is just as proper for Congress to protect free labor against the interstate transportation of convict-made goods as it is to protect free labor against the flooding in from abroad of the products of slave labor, and Congress has in fact, as we have already shown, repeatedly passed laws in pursuance of this principle.

Just as clearly, if the labor of convicts is so utilized as to destroy the property of free men in their labor, or the property of others in the products of free labor, it can hardly be questioned that prohibitions upon the use of convict labor could be imposed by any governmental power established and functioning to preserve the freedom of labor, and that Congress may, if it chooses, protect interstate commerce in the products of free labor from the demoralizing influence of the competitive products of convict labor, and may utilize prohibition as a means of regulating the development of interstate commerce in the products of what Congress might regard as an evil business, that is, the sale of convict-made goods.

(b) When the Court noted in *Hammer v. Dagenhart* certain instances in which "the use of interstate transportation was necessary to the accomplishment of harmful results," it used language from which the inference might reasonably be drawn, not that the article itself

must be harmful, but that where the *results* of its transportation are harmful the prohibition of such transportation can be sustained.

The Court did say of the products of child labor that they were "of themselves harmless," that they were legitimate subjects of commerce. But as to articles the use of which calls for regulation, its conclusion was no more than that the authority to prohibit is but the exertion of the regulating power.

That the *Child Labor* case is altogether distinguishable from the present matter, but, so far as it is at all pertinent, is in favor of the constitutionality of the Ashurst-Sumner Act, is made clear by a brief examination of its bases. In that case the Supreme Court held invalid an Act of Congress (39 Stat. at L. 675, Ch. 432) which, as it said

> "does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. * * * The Act permits them (such goods) to be falsely shipped after 30 days from the time of their removal from the factory. * * * Over interstate transportation or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulations. * * * To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of Federal authority over interstate commerce."

Clearly this Act, with its 30 day provision, was an attempt to regulate manufacture. It bore no relation to the laws of any States from which or into which such products were to be shipped. No State had a law prohibiting the sale of such goods on the open market. It prohibited the sale of such goods in all States, regardless of State regulation thereof, and thus usurped a State

function. It set up in itself the standard of labor, thus usurping a purely local State power.

The Ashurst-Sumners Act makes no attempt to regulate production by prison labor. It permits a State to produce in its prisons whatever commodities it may choose, in any amount and under any conditions. It does not interfere with the disposal of such commodities to persons within that State or to persons within any other State which permits the sale on the open market, and use, of convict-made commodities. It merely says to a State and to the handlers of prison-made goods that they may not use the facilities of interstate commerce to transport articles into States where they are to be sold in violation of the law of the State into which they are shipped. It would scarcely be urged by anyone that the Webb-Kenyon Act was an attempt by Congress to regulate internal manufacturing, and it cannot be said that this Act, which is in almost identical language, has such effect.

The Ashurst-Sumners Act, in brief, supports the authority of the States over matters purely local; it does not restrain the States in the regulation of their own industries, but assists those which seek to protect the general welfare of their people by prohibiting the sale of prison-made goods, to ward off the influx in interstate commerce of such goods from other States which do not see fit so to protect their people and regulate their prisons. The Act accordingly removes an impediment in the enforcement of State laws, just as did the Wilson Act and the Webb-Kenyon Act and the Lacey Act and the Hawes-Cooper Act.

A few words may dispose of the *Child Labor Tax* case, 259 U. S. 20, which the Supreme Court held could not be distinguished from *Hammer v. Dagenhart;* also of the question of invalid delegation of power by Congress,

which point was raised *In re Rahrer* and *Silz v. Hesterberg, supra,* and decided adversely to the petitioner's contention herein. It may also be noted briefly that, even if there are some subjects which are in their nature national, or admit only of one uniform system of regulation, and so permit only of exclusive control by Congress, convict-made goods are not within that class.

In conclusion, we submit, upon all the foregoing, that, as a State may undoubtedly, for the purpose of guarding the best interests of the commonwealth and the security and welfare of its inhabitants, forbid all sales of prison-made goods within its limits, so the Congress, to protect the commerce which concerns all the States, not usurping the State's police powers but enabling them to be effectual, may prohibit the carrying into a State of objects of commerce which create the mischiefs sought to be remedied by the declared public policy of the State.

It would be hard law, indeed, and no case has ever yet so held, if Congress may pass acts prohibiting the interstate transportation of harmless articles of commerce, for the protection of the police power of the States in legislating upon their natural resources, and yet is deprived of the authority to protect the police power of a State when it has legislated to conserve human resources and the welfare of human beings.

The Act should be sustained in its Entirety.

Respectfully submitted,

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HENRY EPSTEIN,
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Of Counsel.

APPENDIX

SUPREME COURT—ALBANY COUNTY.

HARRY GREENTHAL,

Plaintiff,

against

JOHN J. BENNETT, JR., as Attorney General of the State of New York,

Defendant.

ULSTER SPECIAL TERM

(December, 1933)

Action to restrain enforcement of the Hawes-Cooper bill (Act of January 1929, ch. 79, 45 Stat. 1084, 49 U. S. C. A. 65) and New York Business Law 69 (L. 1933, ch. 26).

Mortimer Fishel, for the plaintiff.

Henry Epstein, Solicitor General for defendant.

MEMORANDUM

(LOUGHRAN, *J.*)

The Act of Congress is assailed as an attempt (1) to delegate to the states the exclusive federal power over interstate commerce; or (2) to control production of innocuous goods so as to equalize competition in industry. I am of opinion that the basis to neither objection inheres in the act. Congress may affirmatively assent to an exercise of state police power otherwise valid, although interstate commerce is thereby limited. *(In re Rahrer,* 140 U. S. 545.) Control of the disposition of prison goods in

one state (if a legitimate end of the police power there) is not essentially the regulation of their production in another state (cf. *Hammer v. Dagenhart*, 247 U. S. 251).

The New York statute is challenged as obnoxious to the due process clauses. That challenge, I think, is invalid. It is the policy of the state, as declared by the statute, "to protect free labor from the unjust competition of convict labor,"—a policy persistently asserted for more than a generation (L. 1894, ch. 696; L. 1928, ch. 805). It is sound to keep convicts at work. The products of free labor must be marketed at a profit. If there be conflict between these objectives, the choice was for the legislature (*Barbier v. Connolly*, 113 U. S. 27; *Noble State Bank v. Haskell*, 219 *id.* 104; *Central Lumber Co. v. South Dakota*, 226 *id.* 157, 160). The cases cited by plaintiff (*People v. Hawkins*, 157 N. Y. 1; *People v. Raymes*, 136 App. Div. 417; aff'd 198 N. Y. 539, 662) are not here controlling. In the *Hawkins* case only one member of the court took the position that the legislation there reviewed amounted to a denial of due process. Final determination of the *Raymes* case also turned on the commerce clause (198 N. Y. 622).

Judgment for the defendant.

Dated January 5, 1934.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936

No. 138

KENTUCKY WHIP AND COLLAR COMPANY,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

BRIEF OF AMICI CURIÆ.

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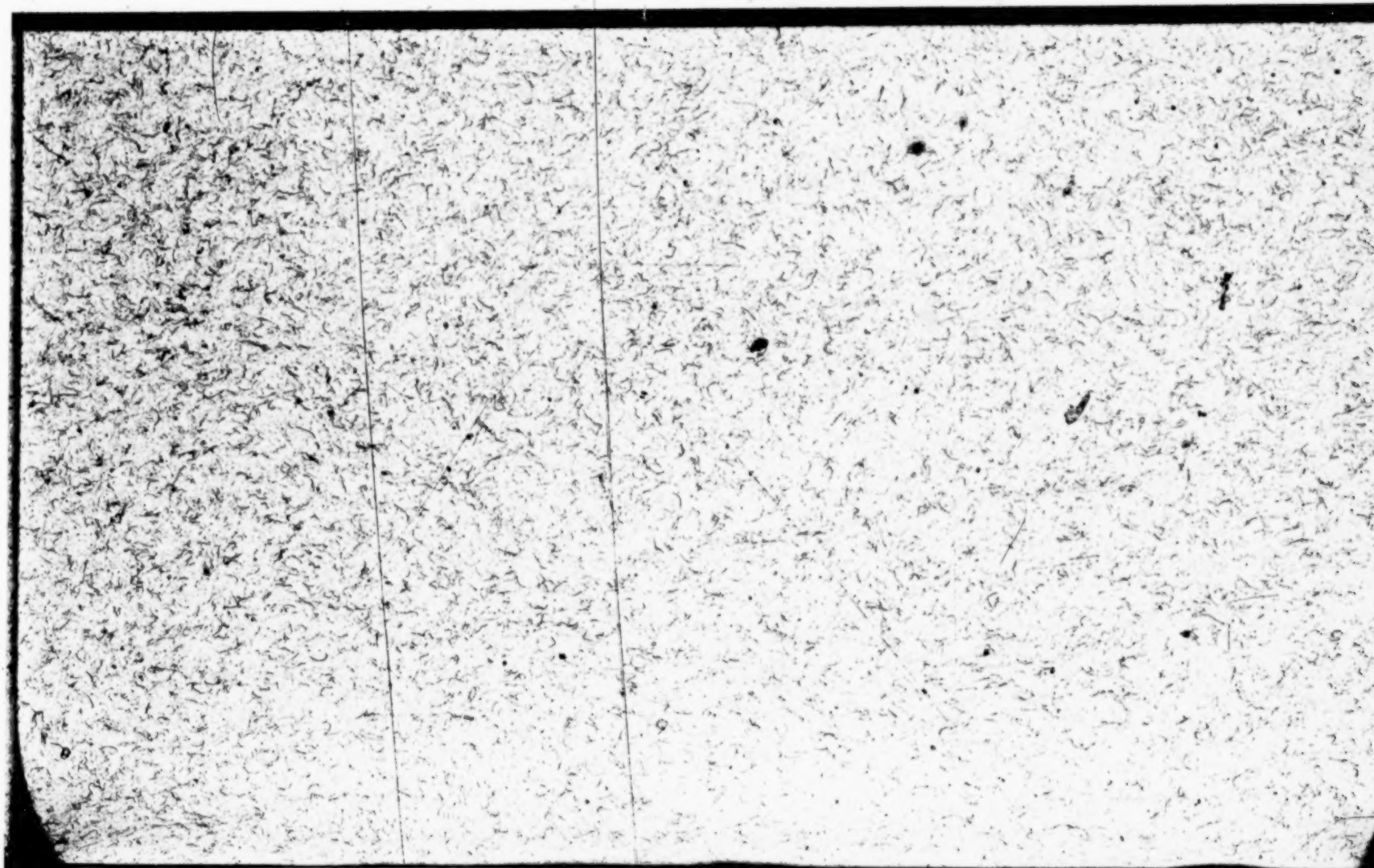

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 138

KENTUCKY WHIP AND COLLAR COMPANY,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

The undersigned are counsel for the Cordage Institute and the American Federation of Labor, both of whom have an interest in the outcome of this litigation as extensive as the parties thereto.

The Cordage Institute is a trade association composed of the manufacturers of a major percentage of hard fiber cordage and twine products manufactured in private factories in the United States, with plants located throughout the country, and whose investment and whose thousands of employees have been, are, and will continue to be

affected by the operation of the Act, the validity of which is here questioned.

The American Federation of Labor, representing the organized working men and women of the United States has a vital concern in the effect and operation of the Act here questioned, in that it bears directly upon a subject matter of interstate commerce affecting its members.

BRIEF OF AMICI CURIÆ.

OPINIONS OF COURTS BELOW.

The opinion of the District Court of the United States for the Western District of Kentucky (R. 29) is reported in 12 Fed. Supp. 37.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 52) was rendered June 1, 1936, and is reported in 84 F. (2d) 168.

JURISDICTION.

The petition for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit was filed June 29, 1936, and allowed October 12, 1936. The jurisdiction of this Court is invoked under the provisions of Sec. 240 of the Judicial Code as Amended (Sec. 347, Title 28, U. S. C. A.).

QUESTION PRESENTED.

Whether the Act of Congress entitled "An act to prohibit the interstate transportation of prison-made products in certain cases," approved July 24, 1935, (49 Stat. 494; 49 U. S. C. A., Secs. 61-64), commonly known as the **Ashurst-Sumners** Act, and providing that it shall be unlawful to transport or cause to be transported, goods made by convict-labor into any state where the same are intended to

be used or sold in violation of the law of such state, and requiring that packages containing convict-made goods when shipped in interstate commerce be marked to show the name and address of the shipper, the nature of the contents, and the name and location of the institution where produced, is violative of the Constitution of the United States, as exceeding the power of Congress to regulate commerce among the states.

STATUTE INVOLVED.

The statute under attack in this case is set out in full in Appendix I hereto.

STATEMENT OF THE CASE.

The petitioner brought its bill in the District Court of the United States for the Western District of Kentucky alleging that it is engaged in the manufacture, with the labor of convicts confined in the Kentucky State Penitentiary at Eddyville, Kentucky, of horse collars and strap goods, and that it has built up a large and valuable business in the sale of such products **to the trade** throughout the United States; that on August 13, 1935, in fulfillment of certain **bona fide** orders theretofore received it tendered to the respondent railroad company several separate shipments of horse collars and strap goods manufactured with prison labor, for the purpose of having the shipments transported to the consignees thereof, each of whom was located in a state other than Kentucky. The respondent company refused to accept said shipments because prohibited by the Act of Congress referred to above.

Several of the shipments tendered were consigned to customers in states whose laws prohibit the sale of any goods, wares or merchandise manufactured or produced, wholly or in part, by convict labor. Certain of the shipments were

consigned to customers in states whose laws require that any convict-made goods sold or offered for sale be plainly marked so as to indicate the fact that they are convict-made. The names of these customers would indicate that they are dealers in and resellers of the articles so consigned. Certain of the shipments were consigned to states whose laws impose no restrictions whatever upon the sale of convict-made goods.

There is no allegation in the bill that any of the packages containing said convict-made goods and tendered for shipment were marked as required by Section 2 of the Act.

The petitioner sought a mandatory injunction requiring the railroad company to accept and transport each of the shipments tendered, and to accept and transport all future shipments of a similar character, and an order restraining the railroad company from refusing to accept and transport all shipments of convict-made goods which may be tendered it by the petitioner, and asked for a binding declaration of rights as between the petitioner and respondent, decreeing and adjudging said Act of Congress to be invalid as violative of the Constitution of the United States (R. 1-23).

A motion to dismiss the bill was filed by the respondent herein, the principal grounds of which were that the bill of complaint set forth no facts which would entitle the plaintiff to the relief sought; that the act of Congress complained of is constitutional and affords no basis for the relief sought by petitioner; and that the bill of complaint on its face shows a lack of equity (R. 24).

By stipulation (R. 25) the case was submitted upon this motion, and a preliminary injunction was issued August 26, 1935 (R. 26).

The facts, as found by the District Court are substantially as alleged in the bill, except that the Court found that the products of the petitioner are not in themselves harmful to the health, peace or good order of the communities

into which they are shipped, or in which they are used (R. 41).

Petitioner filed a motion for an additional finding of fact (R. 43) that the articles involved are not in and of themselves, in any particular, harmful to the general welfare of the communities into which they are shipped, which motion was overruled (R. 43).

The District Court found as its conclusions of law that the petitioner had no adequate remedy at law; that the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those states which prohibit the sale or possession of such goods is invalid and beyond the constitutional power of Congress; that the Act in so far as it prohibits the shipments of convict-made goods into states which require that such goods shall be labeled so as to indicate the fact, before being sold or offered for sale, unless such goods are so labeled before interstate shipment, is a valid exercise of the power of Congress under the Constitution; that Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, before shipment, be so labeled as to indicate that the contents are convict-made, together with the name and location of the prison where made; that Section 2 of the Act is separable, valid and enforceable; that the portion of Section 1 which operates to prohibit shipment of unlabeled convict-made goods into those states prohibiting their exposure for sale, or sale, unless so labeled, is separable from the other part of Section 1 of the Act, and is valid and enforceable; that the petitioner did not label the articles tendered to the respondent for shipment to those states requiring convict-made articles to be labeled before sale or exposure for sale; that the respondent was not required to accept such shipments and to transport same to their destination; that the petitioner did not mark any of the contain-

ers of any of the shipments enumerated in the bill as required by the Act, and therefore the respondent was not required to accept any of such shipments or transport the same (R. 41-42).

The petitioner's bill was accordingly dismissed at its cost, and the preliminary injunction theretofore issued was continued in force pending an appeal (R. 42). The petitioner appealed to the United States Circuit Court of Appeals for the Sixth Circuit and that Court held the entire Act to be constitutional and affirmed the decree of the District Court dismissing the bill (R. 51). It is asserted by the petitioner that the **Ashurst-Sumners** Act is violative of the Constitution of the United States in that it is not a valid exercise of the power of Congress to regulate commerce among the States; that it contravenes the Fifth and Tenth Amendments to the Constitution of the United States; and that it attempts to delegate to the several States the prohibition and regulation of interstate commerce.

ARGUMENT.

I.

THIS COURT HAS REPEATEDLY CONSIDERED CONDITIONS CONFRONTING CONGRESS WHEN PASSING UPON ITS ACTS TO MEET THOSE CONDITIONS.

In determining the questions presented in this case we inquire first as to the occasion for the legislation and its history.

Nebbia v. New York, 291 U. S. 502, 515, 78 L. ed. 940, 944;

United States v. Anderson, 9 Wall. 56, 65, 19 L. ed. 615, 617;

Costanzo v. Tillinghast, 287 U. S. 341, 345, 77 L. ed. 350, 353.

We must look to contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative bodies to determine the evil which it is designed to remedy.

United States v. Union Pacific R. Co., 91 U. S. 72, 79, 23 L. ed. 224, 228;

United States v. Laws, 163 U. S. 258, 262, 41 L. ed. 151, 153;

United States v. Missouri Pacific Railroad Co., 278 U. S. 269, 278, 73 L. ed. 322, 377.

In 1929 the Congress passed an Act entitled "An Act to divest goods, wares and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases", and known as the **Hawes-Cooper** Act (45 Stat. 184; 49 U. S. C. A., Sec. 65), which provided that all goods, wares and merchandise manufactured or produced by convict labor, or in any penal institution, and transported into any state and remaining therein for use, consumption, sale or storage, shall upon arrival and delivery in such state be subject to the laws thereof, to the same extent and in the same manner as though such goods had been produced in such state. The act became effective on January 19, 1934, five years from the date of its approval.

The reasons which impelled the passage of that Act by the Congress have so recently been considered by this Court in the case of **Whitfield v. Ohio**, 297 U. S. 431, 80 L. ed. 527, that it is unnecessary to review them here. It is sufficient to say that at the time of its consideration of the **Ashurst-Sumners** Act the Congress had before it information disclosing a continued and substantial increase in the production and interstate sales of prison-made goods, notwithstanding the previous passage by twenty-one states of laws prohibiting such sales. The United States Department of

Labor issued a report giving the result of a survey of the extent and character of prison labor in the United States in 1932. (Bureau of Labor Statistics, Bulletin No. 595.) This document, issued in 1933, covers the period midway between the approval of the **Hawes-Cooper** Act and its effective date. It shows that goods in the value of approximately $28,000,000 were manufactured in State prisons and sold in the open markets of the country, and that 65.7 per cent (as against 58 per cent in 1923) of such goods were sold outside the State where produced, thereby imposing upon certain unwilling states most of the financial burden of the administration of the penal institutions of those states whose prison goods were sold in interstate commerce.

It was also disclosed in this report that **the Kentucky prisons in 1932 produced goods in the value of $3,006,763, of which there were sold outside the state, goods totaling in value $2,738,902.** It was also shown that in all the prisons of the country 82,000 prisoners were engaged in productive employment in 1932, as against 51,000 prisoners so engaged in 1923; that more than 19,000 prisoners were engaged in the production of clothing alone in 1932, as against 10,000 in 1923.

More than 19,000,000 work shirts (as against 13,800,000 in 1923) were manufactured in prisons and sold in the open market in 1932 in competition with approximately 62,000,000 work shirts made by free labor; 7,000,000 pairs of pants were produced in prisons and sold upon the open market in competition with 27,000,000 pairs of work pants made in private factories for the same year and, in addition, some 640,000 pairs of overalls were produced in prison factories during the same period. In 1923, the prisons produced only 3,000,000 pairs of pants. There were sold upon the open market in 1932 more than 3,000,000 brooms in competition with private broom factories, in which the blind were very widely employed. As against 61,000,000

pounds of twine and rope produced by prisons in 1923, more than 63,000,000 pounds of binder twine alone were so produced in 1932, and sold in competition with 158,000,000 pounds of such twine produced by private industry with free labor. This latter figure is to be compared with more than 240,000,000 pounds sold by free industry in 1923. In addition to the binder twine more than 3,500,000 pounds of rope made by prisons went into competition with rope produced by private industry in 1932.

The report disclosed that in 1932 approximately 4,000,000 suits of underwear were made in prisons for sale on the open market, as against approximately 15,000 in 1923; that prisons produced for sale in the open market in 1932 approximately 1,500,000 children's play suits as against 919,000 in 1923; that in 1932 there were produced by the prisons for sale approximately 2,000,000 dresses; while it is not shown that any were produced in 1923; that in 1932 approximately 800,000 wood chairs were produced in prisons for sale in the general markets as against 400,000 in 1923. Many other items might be mentioned but these are sufficient to show the trend of prison production which concerned the Congress when it came to consider the problem.

The Congress in its consideration of the Act in question here also had the benefit of another and more recent investigation conducted by order of the President of the United States. On October 12, 1934, almost nine months after the effective date of the **Hawes-Cooper** Act (upon which date also became effective the statutes of many of the states prohibiting the sale of prison-made goods) the President appointed a special committee and directed it to make an investigation with respect to the competition of the products of prison labor with the products of the cotton garment industry. (Order No. 118-135.) This committee on November 26, 1934, made public its report, after a

thorough investigation of the effect of the sale in the commerce of the United States of convict-made goods. The Committee in its conclusions stated:

> "The only true solution of the prison labor problem is one that will effectually remove the products of prison labor from the ordinary channels of competitive trade and commerce."

And again:

> "For many years penal institutions have emphasized the production of cotton garments under a contract system and have marketed their products at prices which outside shops found difficult to meet. Prison labor competition made the maintenance of any standards in the industry outside progressively difficult, and forced the manufacturer into out-of-the-way places where child labor, night work, long hours, and poor pay became the rule. It has been impossible in the past for the industry to achieve stability, to increase its wages, or to improve its wages, or to improve its standards, because of the lower costs of prison manufacture. The prison contractor had the advantages of free rent, light, and heat, of low labor costs, and of a controlled labor force—there is ample evidence in the history of prison contracting that the disciplinary machinery of the institutions was often used to inflict physical punishment upon the prisoner who failed to complete his alloted task. The prison contractor supplied work for the prisoners and in one way or another added emoluments to the agents of the State who were participants in the execution of the prison labor contract. The system served the contractor and the prison administration. It was, however, in many instances a bane and a curse in the lives of the prisoners, and the low-priced products kept wages down and the standard of living below a decent level for the workers outside."

* * * * * * *

> "It is clear that the attitude of the Government, as expressed through Congressional action and through

the reports of commissions, has been that it is undesirable social policy to promote profit-making industries in penal institutions."

That the Senate Committee on the Judiciary, which reported the **Ashurst-Sumners** bill in the Senate, had in mind the purpose of **aiding the states** in the enforcement of their laws enacted subsequent to the passage of the **Hawes-Cooper** Act, is evident from the language of its report. It was said:

"For many years the Congress has considered bills relating to the sale of prison-made goods. Extensive hearings have been held on these measures which have thoroughly revealed **the evils attending the sale of such goods in the open market**, in competition with goods manufactured and produced by free labor. These evils impelled the Congress in 1929 to enact the **Hawes-Cooper** law, by virtue of which prison-made goods upon their entry and delivery into a state, became subject to the laws of that State.

"**At present 21 States, with a population in excess of 75 millions, have enacted laws prohibiting the sale, in the open market, of prison-made goods.** This bill is designed to prohibit the transportation of such goods into the States which have thus legislated, in cases in which such goods are to be received or used in violation of the State law. The principle involved in this bill has been frequently sustained by the Supreme Court of the United States. Consequently, the members of the committee believe beyond the peradventure of a doubt that the bill is constitutional." (Report No. 906 U. S. Senate, 74th Congress, 1st Session). (Boldface ours.)

Thirty states representing a population of more than 90,000,000, **now** have statutes prohibiting the sale of prison-made goods within their borders, or requiring that all such goods offered for sale be marked or labelled to show the fact that they are prison made.

But notwithstanding the various state laws, dealers in prison-made goods continued to sell them in constantly increasing quantities **in violation of such laws.** The Bill of Complaint of the petitioner herein not only shows that it has been a party to such violations, but that it expects to continue to do so. It clearly demonstrates the necessity for the law which is under attack here.

The Ashurst-Sumners Act was adopted to prevent the exclusive power of Congress over interstate commerce from being used as a cloak for the introduction of prison made goods into those states which have legislated to preserve their policies from impairment or defeat by declaring the sale of prison made goods injurious to the public welfare, and therefore unlawful, a declaration which a state "has the right and power, so far as the federal Constitution is concerned" to make. **Whitfield v. Ohio, Supra.**

II.

THE VALIDITY OF STATE LAWS PROHIBITING THE SALE OF CONVICT MADE GOODS ON THE OPEN MARKET HAS BEEN SETTLED.

In the case of **Whitfield v. Ohio, Supra,** this court had under consideration the validity of Secs. 2228-1 and 2228-2 of the General Code of Ohio, which prohibits the sale of convict made goods upon the open market in that state, and also the validity of the **Hawes-Cooper** Act. Substantially the same arguments were advanced by the petitioner in that case against the validity of those statutes as are advanced by the petitioner here against the **Ashurst-Sumners** Act. The issue was determined adversely to the contentions of the petitioner, and both the Ohio statute and the Act of Congress were sustained as proper enactments.

In that case this court said:

> "As interpreted by the Court below, the laws of Ohio passed in pursuance of the State Constitution **prohibit**

> **the sale in the open market** of goods made in Ohio by convict labor. The statutory provision here challenged enforces, without discrimination, the same rule as to the convict-made goods of **other states when they are brought into Ohio**; and the contention in respect of the privileges and immunities clause must be rejected as without substance." (Boldface ours.)

And with specific reference to the right of a state to enact such legislation this court said:

> "All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. **A state** basing its legislation upon that conception **has the right and power, so far as the federal Constitution is concerned,** by non-discriminating legislation, **to preserve its policy from impairment or defeat, by any means appropriate to the end** and not inconsistent with that instrument. The proposition is not contested that **the Ohio statute would be unassailable if made to take effect after a sale in the original package. And the statute as it now reads is equally unassailable,** since Congress has provided that the particular subjects of interstate commerce here involved 'shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case', In Rahrer, supra, p. 562, namely upon arrival and delivery." (Boldface ours.)

Notwithstanding the fact that several pages of the Petitioner's brief are devoted by the learned counsel ~~for appellant~~ to the argument that much of the opinion of the Supreme Court in the *Whitfield* case is *dicta*, the paragraph of the opinion just quoted unequivocably establishes, in language so clear that it cannot be misinterpreted, the power of a state to prohibit the sale of prison-made goods upon the open markets thereof.

It follows that if a state has the right and power to prohibit the sale of, or traffic in prison-made goods, it has the right to exercise a lesser degree of that power and require only that prison-made goods when offered for sale within its jurisdiction be labeled as such. Otherwise, we should be faced with the contradiction in terms that because the legislature "had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power." **James Clark Distilling Company v. Western Maryland Railroad Company**, 242 U. S. 311, 331, 61 L. ed. 332, 340.

The only object in failing to place a label upon convict-made articles, or in attaching a misleading label to the same is to make it appear that such goods were produced in a factory where they were not actually produced, or by labor by which they were not actually produced, thus inducing unwary purchasers to buy them as and for articles produced by free labor in a free industrial plant.

That the public has a right to be fully advised as to the goods which it purchases is well settled. Nobody has a right to represent his goods as the goods of somebody else. Nobody has a right to make any false, misleading or deceptive representations as to his goods. It is not necessary that an express representation be made. It is sufficient if the goods are marked in such a way as to result, or if the failure to label them, results in the public's being deceived or misled.

In **Federal Trade Commission v. Algoma Lumber Company**, 291 U. S. 67, 78 L. ed. 655, it was held that the marketing of California pine as White pine constitutes a deception and fraud and was an unfair practice in commerce which the Federal Trade Commission was justified in suppressing.

This decision emphasizes the right of the public to get what it chooses although the choice may be dictated by

caprice or by fashion, or even by ignorance. At page 78 (662) this Court said:

> "Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. **The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. Federal Trade Comm'n. v. Royal Milling Co.**, 288 U. S. 212, 216; **Carlsbad v. W. T. Thackeray & Co.** (C. C.), 57 Fed. 18. **In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.**" (Boldface ours.)

In **Elgin National Watch Co. v. Illinois Watch Case Co.**, 179 U. S. 665, 674, 45 L. ed. 365, 380, Mr. Chief Justice Fuller said:

> "In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, **and the public is entitled to the means of distinguishing between those and other goods;** and protection is accorded against unfair dealing, whether there be a technical trade mark or not. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another." (Boldface ours.)

Of the right of the public to know what it is purchasing, the Court in **Federal Trade Commission v. Royal Milling Company**, 288 U. S. 212, 77 L. ed. 706, stated at page 216 (709):

> "If consumers or dealers prefer to purchase a given article **because it was made by a particular manufacturer or class of manufacturers**, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin." (Boldface ours.)

And at page 217 (709) of the opinion it is stated:

> "The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, **and which they might or might not buy if correctly informed as to its origin.** We are of the opinion that the purchasing public is entitled to be protected **against that species of deception, and that its interest in such protection is specific and substantial.**" (Boldface ours.)

In **Prince Mfg. Co. v. Prince's Metallic Paint Co.**, 135 N. Y. 24, 17 L. R. A. 129, an injunction to protect a trademark was refused by reason of a false representation as to the place from which the ore was obtained and the New York Court of Appeals used the following language:

> "Any material misrepresentation **in a label** or trademark **as to the person by whom the article is manufactured, or as to the place where manufactured,** or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. The courts do not in such cases, take into consideration the attitude of the defendant. * * * And, although the false article is as good as the true one, 'the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce.'" (Boldface ours.)

A number of California cases are cited by the petitioner in support of its contention that the state may not require the labeling of prison-made goods. It is to be observed, however, that a later case decided by the Supreme Court of California in October, 1932, is not included in the list of cases relied upon. **In re Bear**, 15 Pac. (2d) 489, 83 A. L. R. 1402. In this case Bear, who was a manufacturer of meringue powders, using egg products from without the United States, was arrested for failure to comply with an act of the California Legislature requiring that each pack-

age of his manufactured commodity be stamped with the information that imported eggs were used in its production. It was contended by Bear, as it is similarly contended here with respect to prison-made goods, that the dried eggs or egg powders used by him were pure, and fit for human consumption and that they had been inspected by Federal officials and imported under the laws of the United States, and therefore, the California act was unconstitutional.

In its decision the California Court quoted with approval the language of the Supreme Court of Washington in **Parrott & Company v. Benson**, 114 Wash. 117, 194 P. 986, where it was stated:

> "Surely when an egg reaches a restaurant, hotel, or bakery and is taken from the package, cooked or mixed with other ingredients, and served to the guest or purchaser as food, it requires no argument or authority to establish beyond cavil that it is no longer an article of foreign commerce over which Congress alone has control; otherwise no article once brought from without into the state, no matter how changed by any conceivable process, could ever become subject to state legislation; but authorities are as numerous as the question is simple."

And in commenting upon the case of **In re Foley** relied upon by the petitioner, the Court said:

> "In re Foley, 172 Cal. 744, 158 P. 1034, Ann. Cas. 1918A, 180, held invalid a statute requiring each imported egg to be stamped, without making any general provision for inspection, or regulating the sale of eggs of inferior quality. The court was of the opinion that the excessively burdensome requirement accomplished no legitimate object. **The opinion recognized, however, that a statute properly framed could validly regulate the sale of imported eggs, and this is undoubtedly the law, as the cases cited above demonstrate.** The provisions of the statute involved herein

> are not too burdensome, and, coupled with the general plan of inspection, they tend to protect the individual consumer against deception." (Boldface ours.)

We conclude, therefore, that if the legislature is of the belief that the interests of the general welfare are best served by requiring only that convict-made goods be labelled, rather than prohibiting their sale altogether, it has the right and power to make such requirement. And in view of the **Hawes-Cooper** Act the state may enforce the provisions of such a statute against the importer.

III.

CONGRESS IN THE REGULATION OF INTERSTATE COMMERCE HAS, WHEN NECESSARY, ACTED TO GIVE FORCE TO VALID STATE LAWS, AND SUCH ACTS HAVE BEEN CONSISTENTLY UPHELD BY THIS COURT.

That Congress possesses supreme authority to regulate interstate commerce, subject only to the limitations of the Constitution, is too well established to require the citation of the numerous cases in this court which have so held. It is also just as well established that "in some circumstances regulation may properly take the form of and have the effect of prohibition." **Northern Securities Company v. United States**, 193 U. S. 197, 335, 48 L. ed. 679, 699.

And as this court said in **United States v. Hill**, 248 U. S. 420, 425, 63 L. Ed. 337, 340:

> "Congress may exercise this authority **in aid of the policy of the state** if it sees fit to do so."

This principle is neither new in theory, nor recent in practice, but has always been recognized by the Congress and approved by the Courts.

By an act approved June 5, 1794 (1 Stat. 378), the Third Congress made provision for the laying of duties and licenses for selling wines and foreign liquors by retail, and requiring that retail dealers in such commodities obtain licenses. This statute provided "that no license shall be granted to any person to sell wines, or foreign distilled spirituous liquors, **who is prohibited to sell the same by the laws of any state.**" (Boldface ours.)

An act of February 25, 1799 (1 Stat. 619), required that United States officers observe quarantines and other restraints established by any state respecting vessels arriving in, or bound to, any port or district thereof, thus assisting in the carrying out of state laws.

The Thirteenth Congress by an act of August 2, 1813 (3 Stat. 72), defined retailers in imported goods, wares or merchandise, as well as in wines and liquors, and required that every retailer of such commodities obtain a license from the collector appointed by virtue of the act. This statute provided also "that no license shall be granted to any person to sell wines, distilled spirituous liquors, **or merchandise**, as aforesaid **who is prohibited to sell the same by any state.**" (Boldface ours.)

An act approved March 3, 1825, (4 Stat. 115), provided for the punishment in accordance with the laws of the state in which the place is situated, of offenses committed in places under the jurisdiction of the United States, where the offense was not theretofore punishable by the Courts of the United States.

By an act approved July 3, 1866 (14 Stat. 82), regulations were made by the Congress for the transportation of explosives. Among other provisions of the statute was one that the regulation so made should not be construed as to prevent any state from prohibiting or regulating the traffic in, or transportation of, such explosives, or from pro-

hibiting the introduction thereof into the state for sale, use or consumption therein.

Thus, it has been recognized from the very foundation of the government that:

> "The state possesses the power to prescribe all such regulations with respect **to the possession, use, and sale of property** within its limits as may be necessary to protect the health, lives, and morals of its people; **and that power may be applied to all kinds of property, even that which in its nature is harmless.**"
>
> **Bowman v. Railway Company,** 125 U. S. 465, 501, 31 L. ed. 700, 712. (Boldface ours.)

And the policy of the National Government, as demonstrated by these acts has been to **lend the force of its regulatory powers in support of the effective operation of state laws in matters affecting the welfare of the citizens of the several states.**

This policy has always been sustained by this court whenever called into question. Indeed, it would appear that the court has in certain instances, suggested this method of cooperation between the federal and state governments. In the case of **Robbins v. Shelby County Taxing District,** 120 U. S. 489, 30 L. ed. 694, involving a Tennessee statute prohibiting the sale by drummers and other persons not having a regular licensed place of business within the taxing district, **of goods, wares and merchandise,** by sample, except upon payment of a privilege tax, it was said by the Court:

> "If the selling of goods by sample and the employment of drummers for that purpose, **injuriously affect the local interest of the states, Congress,** if applied to, **will undoubtedly make such reasonable regulations as the case may demand.**" P. 498 (698). (Boldface ours.)

In the case of **Leisy v. Hardin,** 135 U. S. 100, 34 L. ed. 128, it was said that:

"Undoubtedly it is for the legislative branch of the state governments to determine **whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, * * * the responsibility is upon Congress**, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." P. 123-124 (137). (Boldface ours.)

* * * * * * *

And the court concluded:

"Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in **Gibbons v. Ogden**, 9 Wheat. 1, 238, 6 L. ed. 23, 80, in **'a frank and candid cooperation for the general good.'**" (Boldface ours.)

The same idea was expressed in **Lyng v. State**, 135 U. S. 161, 34 L. ed. 152. In this case the Court said:

"The same rule that applies to * * * the products * * * of any state, applies to **all commodities** in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts, and the usages of the commercial world. **It devolves on Congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances.**" P. 167 (153). (Boldface ours.)

And in **Schollenberger v. Pennsylvania**, 171 U. S. 1, 43 L. ed. 49, involving oleomargarine, Mr. Justice Peckham stated for the court:

> "**In the absence of Congressional legislation**, therefore, the right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state." P. 23 (57). (Boldface ours.)

It may be observed that in these opinions the court referred consistently to "articles of commerce," "articles of trade" and the "transportation of commodities," and not merely articles which in and of themselves are inherently harmful.

These repeated and emphatic assertions of this court, even before the issue was squarely presented to it, and the decisions of this court hereinafter discussed, we submit, unmistakably establish the right of Congress to make the regulation involved in this case.

IV.

ABSOLUTE PROHIBITION OF AN ARTICLE OF COMMERCE MAY BE PROVIDED WHEN NECESSARY TO PREVENT THE SPREAD OF AN EVIL.

The contention of petitioner that the power of Congress to regulate interstate commerce by prohibiting the interstate transportation of particular commodities is dependent upon the inherently evil or harmful character of the commodity, is wholly without substance. It is urged by petitioner that since the articles here are not of an inherently harmful nature, the Court may not look to the evils resulting from their interstate transportation and sale in violation of state laws, and in competition with free labor and private industry. This view is not sustained by the decisions.

It was said by this Court in the **Whitfield case, supra,** that:

> "The view of the State of Ohio that the **sale** of convict-made goods in competition with the products of

free labor **is an evil**, finds ample support **in fact** and in the similar legislation of a preponderant number of the other states. Acts of Congress relating to the subject also recognize **the evil.** In addition to the Hawes-Cooper Act, the importation of the products of convict labor has been denied the right of entry at the ports of the United States and the importation prohibited. C. 497, Sec. 307, 46 Stat. 689; Title 19 U. S. C. (1934 ed.), Sec. 1307. And the sale to the public in competition with private enterprise of goods made by convicts imprisoned under federal law is forbidden. C. 340, Sec. 5, 46 Stat. 391; Title 18 U. S. C. (1934 ed.), Sec. 744C." (Boldface ours.)

This court has recognized in a long line of decisions that regulation as to articles, the use or disposition of which is an evil that has been prohibited by a number of the states, can only be accomplished by absolutely prohibiting the interstate transportation of such articles. One of the cases illustrating the application of this principle is **Champion v. Ames**, 188 U. S. 321, 47 L. ed. 492, which sustained an act of Congress prohibiting the importation into the United States or the transportation from one state to any other state of "**any paper, certificate or instrument**" purporting to be or represent a lottery ticket. The Supreme Court in sustaining this statute stated:

"We are of opinion that **lottery tickets are subjects of traffic**, and therefore are subjects of commerce, **and the regulation of the carriage of such tickets from state to state**, at least by independent carriers, **is a regulation of commerce among the several states.**" P. 354 (500).

"If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, **for the protection of the people**

> **of all the states**, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?'' P. 355 (501). (Boldface ours.)

We emphasize that the court did not base its decision upon the ground that the ''paper, certificate or instrument' was of an **inherently harmful** nature. In fact such article in itself is no more harmful than the articles involved in this case. The decision was based upon the fact that many states of the union had recognized ''**the evils** that inhere in the raising of money in that mode,'' and therefore, the action of Congress

> ''**only supplemented the action of those states**—perhaps all of them—**which** for the protection of the public morals, **prohibit** the drawing of lotteries, as well as **the sale or circulation of lottery tickets**, within their respective limits. **It said**, in effect **that it would not permit the declared policy of the states**, which sought to protect their people against the mischiefs of the lottery business, **to be overthrown or disregarded by the agency of interstate commerce.** We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy by legislation, the whole field of interstate commerce.'' P. 357, 358, (502). (Boldface ours.)

Exactly the same situation exists here. Most of the States have enacted legislation prohibiting the sale of prison-made goods, or requiring that they be labelled when sold, and by the adoption of the **Ashurst-Sumners** Act the Congress has sought to prevent the declared policy of those states from being overthrown or disregarded by the agency of interstate commerce.

The Congress has enacted a statute entirely **prohibiting** the transportation of stolen motor vehicles in interstate or foreign commerce. That act was sustained by the court in **Brooks v. United States**, 267 U. S. 432, 69 L. ed. 699, although a stolen automobile is not in itself more inherently harmful than one not stolen. It is the transportation and sale in interstate commerce of stolen automobiles, just as it is the transportation and sale in interstate commerce of prison made goods in states restricting such sale, that causes the evil. Mr. Chief Justice Taft, speaking for the court in that case, stated that:

> "Congress can certainly regulate interstate commerce to the extent of **forbidding** and punishing **the use of such commerce** as an agency to promote immorality, dishonesty, or the **spread of any evil, or harm to the people of other states from the state of origin.**" P. 436 (701). (Boldface ours.)

So, since the sale of convict-made goods in competition with the products of free labor is an evil, recognized as such by the Congress, a preponderant number of the legislatures of the forty-eight states, and by the courts, the prohibition of interstate commerce in such goods may be justified by the application of the principle enunciated in that case.

In 1912 Congress exercised its powers to regulate interstate commerce by the passage of the act of July 31, 1912 (37 Stat. 240, U. S. C. A., Title 18, Sec. 405), which act, without reference to whether the several states regulated or prohibited the showing of prize fight films, expressly prohibited the importation into the United States and the transportation in interstate commerce of such films. This court, in the case of **Weber v. Freed**, 239 U. S. 325, 60 L. ed. 308, upheld the constitutionality of that act. Although the court was there concerned with a case of importation

of a prize fight film from a foreign country, the courts throughout the country have considered the **Weber** case as dispositive of all questions of constitutionality of that act. See **United States v. Johnston**, 232 Fed. 970, and **Rose v. St. Clair**, 28 Fed. (2d) 189, both cases relating to transportation of prize fight films in interstate commerce. It is respectfully but emphatically submitted that if Congress may prohibit the importation of prize fight films from another state, into a state which permits the showing of such films, it assuredly may not be contended that Congress is without power to prohibit the transportation of prison-made goods into a state which prohibits their sale.

In the case of **Hippolite Egg Co. v. United States**, 220 U. S. 45, 55 L. ed. 364, it was held to be within the regulatory power of Congress to **prohibit** the transportation in interstate commerce of adulterated **or misbranded** articles of food. This legislation was supplementary to legislation which had been enacted in many of the states prohibiting the sale of such adulterated or misbranded articles.

In the case of **Hoke v. United States**, 227 U. S. 308, 57 L. ed. 523, the prohibition by congressional enactment of the transportation in interstate commerce of women and girls for immoral purposes was sustained as a valid exercise of the power vested in Congress to regulate commerce among the states. This statute was in aid of the enforcement of state laws forbidding prostitution, and the same argument was urged against its validity that is being asserted here—that it was an unconstitutional invasion of the rights reserved to the states. But it was pointed out by this court that:

> "There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the

states cannot reach and over which Congress alone has power; **and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality.** Its exertion does not encroach upon the jurisdiction of the states." P. 321 (527). (Boldface ours.)

* * * * * * *

"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and **the powers** reserved to the states and those **conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.**" P. 322 (527). (Boldface ours.)

* * * * * * *

"Motives executed by actions may make it the concern of government to exert its powers. **Right purpose and fair trading need no restrictive regulation, but let them be transgressed, and penalties and prohibition must be applied.** We may illustrate again by the pure food and drug act. **Let an article * * * be misrepresented by false branding**, and Congress may exercise its prohibitive power." P. 322 (527). (Boldface ours.)

Again, we submit, the same principle is involved here as was involved in that case. In the exercise of their control over prison-made goods the states may make the sale of such goods within their jurisdiction a crime. But there is a domain over which Congress alone has exclusive power, and if this power be invoked to prevent what the states cannot, it is an argument for—not against—its validity.

The Congress has prohibited the larceny of goods or chattels moving as, or which are a part of an interstate or foreign shipment, or the receipt or possession of such goods, knowing them to have been stolen. The same statute pro-

hibits the interstate transportation of goods or chattels, knowing them to have been stolen. (47 Stat. 773, Sec. 409, Title 18, U. S. C. A.). Convictions under this Act have been sustained by the Courts. **Goldstein v. United States** (C. C. A. Cal.), 73 F. (2nd) 804; **Cherry v. United States** (C. C. A. Ill.), 78 F. (2nd) 334.

It has been made unlawful to transport or aid in the transportation in interstate commerce of kidnapped persons. (48 Stat. 781, Sec. 408a, Title 18, U. S. C. A.). A conviction under this Act has been upheld. **Gooch v. United States** (C. C. A. Okla.), 82 F. (2nd) 534, Certiorari denied, 56 S. Ct. Rep. 683, 80 L. ed. Adv. Opp. 674.

The Congress has **prohibited** the movement or travel in interstate commerce of any person, with the intent to avoid prosecution for murder, kidnapping, burglary, robbery and other offenses. (48 Stat. 782, Sec. 408e, Title 18, U. S. C. A.)

It would seem to be just as much within the power of the Congress to prohibit the interstate transportation of **any article** to be used for the purpose of violating a state law, as it is to prohibit the transportation of an article, being the instrument through which a state law has theretofore been violated. We submit there can be no difference in principle.

V.

THE EXTENT TO WHICH A POWER OF CONGRESS TO REGULATE MAY BE EXERCISED, IS WITHIN THE DISCRETION OF CONGRESS.

There are many instances where the Congress has exercised its regulatory powers over interstate commerce to a lesser degree than by absolute prohibition of such commerce in the subjects regulated, and these acts have always been sustained.

Illustration of this type of regulation is to be noted in the

Wilson Act (26 Stat. 313), providing that intoxicating liquors transported from one state to another and remaining therein for use, consumption, sale or storage, shall upon arrival in such state be subject to the operation and effect of the laws of the same, to the same extent and in the same manner as though such liquors had been produced therein, whether introduced in the original package or otherwise. This statute was sustained in **Wilkerson v. Rahrer (In re Rahrer)**, 140 U. S. 545, 35 L. ed. 572, in which it was said by Mr. Chief Justice Fuller on behalf of the court:

> "And **this court has uniformly recognized state legislation, legitimately for police purposes**, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government." P. 554 (574). (Boldface ours.)

It was stated by the court that the adoption of the Constitution placed in the Congress the power to prevent the enactment by the states of commercial regulations discriminatory in character or detrimental to the common interests. But

> "this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the State, or to grant a power not possessed by the States, or to adopt State laws. **It has taken its own course and made its own regulation applying to these subjects of interstate commerce one common rule whose uniformity is not affected by variations in State laws in dealing with such property.**" P. 561 (576). (Boldface ours.)

Further example may be found in the **Lacey Act** (31 Stat. 187), making unlawful the transportation to any other state

of the dead bodies of any game animals or birds which have been killed or shipped in violation of the laws of the state in which they were killed or shipped. The same act provides that the dead bodies of game animals or birds transported from one state into another for use, consumption or sale therein, shall be subject to the operation and effect of the laws of the state of destination, to the same extent and in the same manner as if such animals or birds had been produced in such state.

This statute, as was pointed out by the court, **relates to wholesome articles of food**—articles which were not inherently harmful—and have been sustained in many cases.

New York, ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75;

LaCoste v. Department of Conservation of State of Louisiana, 263 U. S. 545, 68 L. ed. 437;

Rupert v. United States, 181 Fed. 87;

State v. Heger, 194 Mo. 707, 83 S. W. 252.

The **Webb-Kenyon** Act (37 Stat. 699), which prohibits the transportation of intoxicating liquors into states, where the same were "intended to be received, possessed, sold, or in any manner used either in the original package or otherwise, in violation of any law of such state," was sustained in the case of **James Clark Distilling Company v. Western Maryland Ry. Co.**, 242 U. S. 311, 61 L. ed. 332.

Section 1 of the Act under consideration here is almost an exact copy of the Act involved in that case, and the argument advanced there was in substance the same as that made by the petitioner here. The Court disposed of it by saying:

> "Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress, in adopting a regulation, had considered the nature

and character of our dual system of government, state and nation, and instead of absolutely prohibiting, has so conformed its regulation as to produce cooperation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution. And it is well again to point out that this abnormal result to which the argument leads **concerns a subject as to which both state and nation, in their respective spheres of authority**, possessed the supremest authority before the action of Congress which is complained of; and hence **the argument virtually comes to the assertion that, in some undisclosed way, by the exertion of congressional authority, power possessed has evaported.**" P. 331, (340-341). (Boldface ours.)

* * * * * * *

"The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, **but the will** which causes the prohibitions to be applicable **is that of Congress**, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. P. 326, (338). (Boldface ours.)

* * * * * * *

"So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the states—so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself." P. 326-327, (339).

The court in its opinion was careful to point out to those who expressed the fear that to sustain the act might lay the

basis for subjecting interstate commerce in all articles to state control, **that such regulation might not be made except as to those articles over which the states and the nation, within the scope of their jurisdiction, possessed an undisputed right of control.** Said the court:

> "Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the **principle** which, after all, dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the Constitution **but for the enlarged right possessed by government** to regulate liquor, **has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied.** In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace." P. 332 (341). (Boldface ours.)

We submit that this Court has already determined that the sale of prison-made goods is a business of such a nature as to justify the exercise of governmental authority over it to the extent that states may prohibit it altogether. Can it be said that the Congress is powerless to adopt regula-

tions "to minimize the evil resulting from violating prohibition of state law" by sending such articles "through interstate commerce into a state" and selling them in violation of such laws? We submit that the very statement of the question exposes the fallacy of the whole argument of the petitioner. The **Clark Distilling Company case**, therefore, is conclusive as to the constitutionality of the **Ashurst-Summers** Act.

Surely liquor, the sale of which was then thought to be so injurious to the welfare of the states that most of them had prohibited it, is no more exceptional, so far as the scope of governmental control over it is concerned, than the sale on the open market of prison-made goods, which thirty states have declared is injurious and disastrous to the general welfare of their citizens. Fine distinctions cannot and may not be drawn to the effect that things which injure the physical or moral welfare are more exceptional in their nature than things which from a social and economic standpoint, are detrimental to the prosperity and welfare of the state and destructive of the peace and good order of the people. Each must be on an equal footing—each is vital to the general welfare.

But in each of these instances, whether the regulation of interstate commerce in specific articles took the form of prohibition of transportation, or whether the regulation merely prescribed the regular means for accomplishing the introduction and incorporation of the articles mentioned into and with the mass of property in the state, or whether the regulation simply prohibited transportation into states where the articles mentioned were to be used in violation of state laws, or prohibited transportation into other states of articles taken in violation of the laws of the state or origin, **the articles regulated, while not necessarily harmful in themselves, were of a sort, or the effect of their use was such, as to give both state and nation**, within the respective

spheres of their authority, **supreme power over them. The test of the power is found, not in the inherent nature of the articles themselves, but in the effect the business of dealing in such articles has upon the public weal. State v. Clausen,** 65 Wash., 156, 117, Pac., 1101, 37 L. R. A. (N. S.), 466.

That principle was well stated by this Court in **Hebe Company v. Shaw,** 248 U. S. 297, 303, 63 L. ed. 255, 259, when it said:

> "If the character or **effect of the articles as intended to be used** 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.'" (Boldface ours.)

It may be reiterated that each of these Congressional enactments was in aid of the enforcement of local policies of the states, enacted in the exercise of their undisputed right to prohibit, within the limits of their authority, the use of such articles in a manner inimical to the general welfare—material or moral.

VI.

THE CHILD LABOR CASE SUPPORTS THE CONSTITUTIONALITY OF THE ASHURST-SUMNERS ACT.

The petitioner herein relies upon the decision in the **Child Labor** case, **Hammer v. Dagenhart,** 247 U. S. 251, 62 L. ed. 1101 as authority for the assertion that the regulation provided in this act may not be made. The statute under attack in that case had no similarity in meaning or effect to the one under consideration here, and in the light of the construction which had previously been made of the language used in the **Ashurst-Sumners** Act, it cannot be contended that the decision in the **Child Labor** case is controlling.

Such a clear distinction exists between the **Child Labor** statute and the one under consideration here that it would seem to require no argument to demonstrate it. The **Child Labor** statute was declared to be unconstitutional on the ground that the prohibition of interstate transportation of products manufactured by child labor constituted an attempt to coerce the **manufacture of commodities in accordance with regulations and standards prescribed by the Congress**, regardless of the laws regulating the labor of children in either the state of origin or destination. The present statute, as we have pointed out is a regulation of interstate commerce in prison-made goods, and is intended to prevent **the evils inherent**, not in the manufacture of the articles, but **in the sale of such goods in violation of the laws of those states which have prohibited it.**

We submit that this court in the **Child Labor** case reaffirmed the doctrine upon which regulations by the Congress similar to that here under attack had previously been sustained, and those principles absolutely support this legislation.

It was urged by the government in that case that adjudicated cases established the doctrine that the power given to Congress to regulate commerce incidently included the authority to prohibit the movement in interstate commerce of ordinary commodities. But the court said that the decisions rested "upon the **character of the particular subjects dealt with and the fact that the scope of governmental authority, state or nation, possessed over them**" is such that the regulation made in each instance was justified. **Hammer v. Dagenhart, supra**, P. 270, (1105). (Boldface ours.)

And further:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control

> the states in their exercise of the police power over local trade and manufacture." P. 273, 274, (1106).
>
> * * * * * * *
>
> "The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution." P. 275, (1107).

As has been shown, thirty states have already exercised their police power over the manufacture and traffic in prison-made goods—matters purely local. The Court nowhere in the opinion in that case used language which justifies the contention that the Congress may not prohibit the interstate transportation of any article, the use or sale of which results in evil consequences. On the contrary, the court restated and emphasized the very principle which we are urging here, when it said of those federal statutes prohibiting interstate transportation:

> "In each of these instances **the use of interstate transportation was necessary to the accomplishment of harmful results.** In other words, although the power over interstate transportation was to regulate, that could only be accomplished **by prohibiting the use of the facilities of interstate commerce to effect the evil intended.**" P. 271 (1105). (Boldface ours.)

The law here is not an invasion of state sovereignty as was the **Child Labor** Act, but is in support of state rights and state authority.

And we earnestly submit that upon the authority of the decision in the **Child Labor** case, the Congress would be entirely justified in absolutely prohibiting the interstate transportation of prison-made goods if necessary to the maintenance of the authority of the states in the enforcement of state laws relating to their sale.

Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. **Chicago, B. & Q. R. Co. v. McGuire,** 219 U. S. 549, 569, 55 L. ed. 328, 339; **Chicago, R. I. & P. R. Co. v. Perry,** 259 U. S. 548, 556, 66 L. ed. 1056, 1061; **German Alliance Ins. Co. v. Lewis,** 233 U. S. 389, 414, 58 L. ed. 1011, 1022.

It is sufficient to say that Congress, in its judgment, has attempted to cooperate in the prevention of an evil which thirty states have sought to control.

VII.

ORIGIN OF COMMODITIES DOES NOT EXEMPT INTERSTATE COMMERCE IN THEM FROM REGULATION BY CONGRESS.

It is urged by the petitioner that the statute under consideration here is aimed at the method of production of the articles and that since Congress has no power to regulate this, it follows that the transportation and sale of such articles may not be subjected to the regulation prescribed here. This contention has no basis in fact, and the conclusion has no support in reason or in authority. It would not be suggested that the **Webb-Kenyon** Act was enacted to regulate the manufacture of intoxicating beverages, yet there the power of Congress to regulate interstate commerce in a commodity the nature of which was such that the state might regulate its manufacture and sale, was upheld by this court.

The Congress is not to be denied the power to protect

navigation on all waterways of the United States against unreasonable obstructions, even though such obstructions were created under sanction of a state. And whether the obstruction is unreasonable is to be determined by the Congress. **Union Bridge Co. v. United States**, 204 U. S., 364, 401, 51 L. ed. 523, 539. It may prevent a conspiracy to obstruct interstate transportation of hats from a state to the various places of their destination, "although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and, some of them were in themselves, as a part of their obvious purpose and effect, beyond the scope of federal authority."

Loewe v. Lawlor, 208 U. S., 274, 301, 52 L. ed. 488, 502.

And the Congress may prohibit the payment, by advertising, for interstate travel although payment in this manner is expressly authorized by state law.

Chicago, I. and L. Ry. Co. v. United States, 219 U. S. 486, 496, 55 L. ed. 305, 309.

While the Congress may not make it unlawful to misbrand articles of food, it is a legitimate exertion of the power of Congress to regulate interstate commerce to make it unlawful to ship or deliver for shipment from one state to another an article of food which is misbranded.

Weeks v. United States, 245 U. S. 618, 622, 62 L. ed. 513, 515.

The argument that the control of the states over manufacture prevented Congress from exercising its power to regulate commerce was urged in the case of **Standard Oil Company v. United States**, 221 U. S. 1, 68, 69, 55 L. ed. 619, 648. In referring to this contention it was stated by the court:

> "So far as the objections of the appellants are concerned, they are all embraced under two headings:

"a. That the act, even if the averments of the bill be true, cannot be constitutionally applied because to do so would extend the power of Congress to subjects **dehors** the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the states. But all the structure upon which this argument proceeds is based upon the decision in **United States v. E. C. Knight Co.**, 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the anti-trust act, and have been so necessarily and expressly decided to be unsound, as to cause the contentions to be plainly foreclosed and to require no express notice."

VIII.

THE LANGUAGE OF THE ASHURST-SUMNERS ACT HAS BEEN CONSTRUED TO BE A PROPER REGULATION OF INTERSTATE COMMERCE.

It is contended by the petitioner that the **Ashurst-Sumners** Act is in effect a prohibition of interstate commerce with purposes similar to those of the **Child Labor** Act and is therefore invalid; or that it is a delegation to the respective states of the power invested in the Congress to regulate commerce, and is invalid on that ground. This contention is wholly without merit. The act is upon its face a regulation—not a prohibition of commerce, nor a delegation of power.

It is settled by an abundance of authority that in adopting the language used in an earlier act, Congress must be considered to have adopted also the construction which had been previously given to such language by the courts and

to have used it according to that interpretation which is known and established.

Hecht v. Malley, 256 U. S. 144, 68 L. ed. 949;

Sessions v. Romadka, 145 U. S. 29, 43, 36 L. ed. 609, 614;

Latimer v. United States, 223 U. S. 501, 604, 56 L. ed. 526, 527.

The language of the **Hawes-Cooper** Act is identical, except as to the commodity involved, with the **Wilson** Act, the **Lacey** Act, and the **Oleomargarine** Act.

The language of the **Ashurst-Sumners** Act is in substance the same as the **Webb-Kenyon** Act.

Both the **Wilson** Act and the **Webb-Kenyon** Act have been construed so many times that their meaning is no longer in doubt. The **Hawes-Cooper** Act has now been construed, the court following the construction previously given to the **Wilson** Act.

It was said in the **Rahrer case, supra**, that:

> "It does not admit of argument that Congress can neither delegate its own powers, nor enlarge those of a state." P. 560 (576).

But that in adopting the **Wilson** Act the Congress,

> "has not attempted to delegate the power to regulate commerce or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule whose uniformity is not affected by variations in state laws in dealing with such property." P. 561 (576).

And so in the **Whitfield case, supra** this Court said of the **Hawes-Cooper Act**:

> "That act is in substance the same as the Wilson Act with respect to intoxicating liquors, passed August 8,

1890, c. 728, 26 Stat. 313, as construed and upheld by this Court. **Rhodes v. Iowa**, 170 U. S. 412, 421-423, 426; **In re Rahrer**, 140 U. S. 545, 559-560, 562, 564."

* * * * * * * *

"If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is clear that the removal of that impediment in the case of prison-made goods **must be upheld for reasons akin to those which moved this Court to sustain the validity of the Wilson Act.**" (Boldface ours.)

* * * * * * * *

"3. That the Hawes-Cooper Act does not constitute a delegation of congressional power to the States is made clear by **In re Rahrer, supra**, pp. 560-561, and by what we have already said under subdivision 2."

In the **Clark Distilling Company case, supra**, upholding the validity of the **Webb-Kenyon Act**, the court in construing it to be a proper regulation of commerce, said:

"As we have already pointed out, the very **regulation made by Congress in enacting the Wilson Law** to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a state, and selling it in violation of such law, was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained." P. 330, (340). (Boldface ours.)

* * * * * * * *

"As the power to **regulate which was manifested in the Wilson Act, and that which was exerted in enacting**

> **the Webb-Kenyon Law, are essentially identical,** the one being but a larger degree of exertion of the identical power which was brought into play in the other, **we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity,**—a result which, as we have previously said, would reverse **Leisy v. Hardin** and overthrow the many adjudications of this court sustaining the Wilson Act'' P. 330 (340). (Boldface ours.)

This act has been before the Supreme Court in many cases since that time, involving in some instances the transportation of non-intoxicating malt liquors, the sale of which were prohibited by State statutes, and the meaning of the language announced in the **Clark** case had become firmly established at the time of the enactment of the act in question here. **United States v. Hill, supra; McCormick & Co. v. Brown,** 286 U. S. 131, 76 L. ed. 522.

We submit therefore that the decision of this Court in the **Whitfield** case, and the decision in the **Clark Distilling Company** case are conclusive as to the validity of the **Ashurst-Sumners** Act.

IX.

POWER OF CONGRESS TO REQUIRE MARKING PACKAGES TRANSPORTED IN INTERSTATE COMMERCE NO LONGER OPEN QUESTION.

Section 2 of the Act here requires that all packages containing any convict-made goods when transported in interstate commerce be plainly marked showing the name and address of the shipper, the nature of the contents, and the name and location of the penal or reformatory institution where produced. But it is urged by appellant that the Con-

gress does not have power to require that shipments of convict-made goods be marked as required by the Act.

The language of this section follows very closely the language found in Section 393, Title 18, U. S. C. A. (31 Stat. 188), which relates to packages containing the dead bodies of game animals and birds, when transported in interstate commerce, and the constitutionality of which has been determined. **Rupert v. United States, supra; LaCoste v. Department of Conservation of State of Louisiana, supra.**

A similar statute relating to the marking of packages shipped in interstate commerce and containing intoxicating liquors (Sec. 390, Title 18, U. S. C. A.), has also been sustained. **United States v. Freeman**, 239 U. S. 117, 60 L. ed. 172; **One Truck Load of Whisky v. United States** (C. C. A. Ohio), 247 Fed. 99.

We take it, to be settled, therefore, that the Congress may make the regulation provided in Section 2 of the **Ashurst-Sumners Act.**

X.

THE ACT VIOLATES NEITHER THE FIFTH OR TENTH AMENDMENTS TO THE CONSTITUTION.

It is contended by the petitioner that the right to do business, the right to own property, and to use it and sell it free of restrictions which would impair its sale value or its enjoyment, is "property" which is protected against national action by the due process clause of the Fifth Amendment, just as it is protected against state action by the Fourteenth Amendment. It is asserted, therefore, that no restrictions or burdens may be placed upon property except that which is of an inherently harmful nature.

We submit that the decisions do not support this proposition, as we have heretofore demonstrated. All property of

whatsoever kind or nature is held subject to the right of the state, within its jurisdiction, or the national government, within the scope of its authority, to enact such regulations and restraints upon its use as may be necessary to preserve and promote what the prevailing opinion deems to be the public welfare. No decision can be cited which affirms the right to do business in violation of valid state laws. In fact, all the decisions are to the opposite effect.

As was stated by Mr. Justice McKenna in **Rast v. Van Deman & Lewis Co.**, 240 U. S. 342, 357, 60 L. ed. 679, 687;

> "It is the duty and function of the Legislature to discern and correct evils, and by evils we do not mean some definite injury, **but obstacles to a greater public welfare. Eubank v. Richmond**, 226 U. S. 137, 142, 57 L. ed. 156, 158; **Sligh v. Kirkwood**, 237 U. S. 52, 59 L. ed. 835, 837." (Boldface ours.)

It was stated by the Supreme Court of Washington in the case of **State v. Clausen, supra,** that under the police power a state might,

> "regulate and control and prohibit any industry, **however innocent it may have been in its inception,** whenever it becomes a menace to the employees engaged in it, the people surrounding it, **or to any considerable number of people at large,** no matter from whatsoever cause the menace may arise." (Boldface ours.)

It has been said by the Supreme Court of Ohio, in **Phillips v. State**, 77 Ohio St. 214, 82 N. E. 1064, that:

> "It is almost an axiom that anything which is reasonable and necessary to secure the peace, safety, morals, and **best interests of the commonwealth** may be done under the police power; and this implies that **private rights exist subject to the public welfare.**" (Boldface ours.)

So in **Boston Beer Co. v. Massachusetts**, 97 U. S. 25, 24 L. ed. 989, it was said:

> "If the public safety or the public morals require the discontinuance of **any** manufacture or **traffic**, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer." P. 32 (992).

In **Mugler v. Kansas**, 123 U. S. 623, 31 L. ed. 205, Mr. Justice Harlan stated:

> "No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare." P. 663 (211).

Therefore, when a business becomes prejudicial to the public welfare, or becomes a menace to any considerable number of people at large, it may be prohibited. In **Murphy v. California**, 225 U. S. 623, 56 L. ed. 1229, Mr. Justice Lamar stated:

> "The Fourteenth Amendment * * * does not prevent legislation intended to regulate useful occupations which, because of their nature * * * may prove injurious or offensive to the public." P. 628 (1232).

And the "regulation or prohibition need not be postponed until the evil has become flagrant." P. 629 (1232).

The business of selling stock on margin or for future delivery may be prohibited. **Otis v. Parker**, 187 U. S. 606, 47 L. ed. 323. In that case it was said:

> "If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction **not in itself necessarily objectionable**, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'" P. 609, 327. (Boldface ours.)

And in **Hannibal & St. Joseph R. Co. v. Husen**, 95 U. S. 465, 24 L. ed. 527, it was stated:

> "It may also be admitted that the police powers of a state justify the adoption of precautionary measures against social evils." P. 471 (530).

And in the very recent case of **Nebbia v. New York**, 291 U. S. 502, 78 L. ed. 940, Mr. Justice Roberts, for the court, reaffirmed these principles. He said:

> "Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government." P. 524 (949).
>
> "The Court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community." P. 525 (950).
>
> * * * * * * * *
>
> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business or to pursue a calling may be conditioned." P. 527-528 (951-952).
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> * * * * * * *
>
> "So far as the requirement of due process is concerned, * * * a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared, by the Legislature to override it." P. 537 (957).

And further:

> "The Constitution does not secure to any one liberty to conduct his business in such fashion as to in-

flict injury upon the public at large, or upon any substantial group of the people." P. 539 (958).

Further examples are unnecessary. In general it may be stated that the possession and enjoyment of all rights are held subject to such regulations or prohibitions as are necessary for the public good. And in particular we assert that the business of dealing in prison-made goods is inherently subject to legislative control, and no such vested right in the business exists as will prevent the legislature from withdrawing the right to deal in such goods from those who previously enjoyed it. **Boston Beer Company v. Massachusetts, supra; Tracy v. Ginzberg**, 205 U. S. 170, 51 L. ed. 755.

The legislature of Kentucky may at its will change the prison system of the state so as to prohibit the manufacture of commodities for sale in the general markets, and the appellant could not be heard to complain that such action deprived it of its property without due process of law, even though its contract with the state for the labor of prisoners has not expired. **Hancock v. Ewing**, 55 Mo. 101; **State v. McCauley**, 15 Cal. 429; **Jones Hollow-Ware Co. v. Crane**, 134 Md. 106.

There is abundant authority for the proposition that the words "due process of law" have the same meaning in the Fifth Amendment within the sphere of federal authority as they do in the Fourteenth Amendment with respect to State legislation. It would seem naturally to follow that if a State may prohibit the sale of prison-made goods without violating the due process clause of the Fourteenth Amendment, the Congress may regulate the interstate transportation of such goods as has been done here, without doing violence to the Fifth Amendment.

If it be seriously urged that the act is inconsistent with

the Tenth Amendment, reserving to the states respectively, or to the people thereof, the powers not delegated to the United States, the answer is that the power to regulate commerce among the states has been expressly delegated to the Congress. As we have said, it would not be asserted, in view of the decisions, that the **Webb-Kenyon** Act was an attempt upon the part of Congress to regulate the manufacture of liquor in those states where such manufacture was permitted. The construction placed by the courts upon the language of that act precludes any such contention being sustained here.

As was so well stated by the Court below, by this act,

> "there is no attempt to foist or impose a policy on the states. The act is a regulation of commerce among the states but does not invade or interfere with the power of the state to regulate their own internal affairs. It was enacted in aid of the maintenance and enforcement of state laws as was the Webb- Kenyon Act, which was held to be a legitimate exertion of the power to regulate commerce and not to be a delegation of Congressional power to the states" (R. 55).

CONCLUSION.

Counsel for petitioner expresses great concern over what is anticipated will be the result flowing from the effect of this statute. In asserting that if it is sustained it will open the door to federal legislation prohibiting the movement in interstate commerce of articles manufactured by open shop concerns, by the negro and unorganized labor of the south, or of articles manufactured in sweat shops, counsel completely overlooks the very principle upon which this act is based.

To make the cases analogous to the statute attacked here, it must appear that a state may prohibit, and has prohibited,

the sale of articles manufactured by open shop concerns, and that a state has the power to prohibit, and has prohibited, the sale of commodities manufactured by negro or unorganized labor or in sweat shops.

Manifestly, a supplemental federal statute could be regarded as valid **only** if the state law which it is designed to supplement is valid. Such a comparison as is made by the petitioner **assumes** the validity of state statutes prohibiting the sale of products of unorganized, negro or sweat shop labor, and also assumes the **invalidity** of statutes prohibiting the sale of prison-made goods. The first assumption is as grossly erroneous as the second.

The principles upon which the validity of the **Ashurst-Sumners** Act is based are as old as the government itself, and have been firmly established by the decisions of this court. The limitations in their application have been plainly marked. This court has never said, and we apprehend it will never say, that the states and the federal government may not act concurrently, each within the scope of its own power, to suppress an evil so destructive in character as the one which has brought forth this legislation.

The enactment of the **Ashurst-Sumners** law, in aid of "the maintenance of the authority of the states over matters purely local", we submit, was in strict accord with that principle of government enunciated by Mr. Chief Justice Marshall in **Gibbons v. Ogden**, 9 Wheat. 1, 205, 6 L. ed. 23, 72, where he said that Congress acted "in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation ~~which~~ that of the Union and those of the States bear to each other * * * and has, in some measure, adapted its own legislation to this object by making provisions in aid of those of the States." Therefore, this act "must be upheld

for reasons akin to those which moved this court to sustain the validity" of the **Webb-Kenyon** Act.

Respectfully submitted,

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APPENDIX I.

The Ashurst-Sumners Act.

AN ACT to Prohibit the Interstate Transportation of Prison-made Products in Certain Cases.

SEC. 1. It shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

SEC. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

SEC. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

SEC. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act.

APPENDIX II.

The Webb-Kenyon Act.

AN ACT Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

SEC. 1. The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

APPENDIX III.

The Hawes-Cooper Act.

AN ACT To divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases.

SEC. 1. All goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

SEC. 2. This Act shall take effect five years after the date of its approval.

APPENDIX IV.

The Wilson Act.

AN ACT to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases.

SEC. 1. All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage

therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

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IN THE

Supreme Court of the United States

October Term, 1936.

No. 138

KENTUCKY WHIP AND COLLAR COMPANY,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF OF STATE OF MINNESOTA, AMICUS CURIAE.

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IN THE

Supreme Court of the United States

No. 138

October Term, 1936.

KENTUCKY WHIP AND COLLAR COMPANY,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE.

Now comes the State of Minnesota, appearing by its Attorney General, Harry H. Peterson, and moves this Honorable Court for permission to file a brief, amicus curiae, in support of the position of the Respondent, the Illinois Central Railroad Company, in the above entitled appeal, before this Court.

HARRY H. PETERSON,
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St. Paul, Minn.

IN THE

Supreme Court of the United States

No. 138

October Term, 1936.

KENTUCKY WHIP AND COLLAR COMPANY,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF OF STATE OF MINNESOTA, AMICUS CURIAE.

INTRODUCTION.

The State of Minnesota is interested in the determination of this case, because affirmance of the judgment below will be in aid of the enforcement of the Laws of Minnesota regulating traffic in prison made goods. These laws are Laws of Minnesota, 1935, Chapter 267, which provides that prison made goods shall be subject to the laws of the State of Minnesota immediately upon arrival therein and shall not be exempt from such laws by reason of being introduced in the original package or otherwise; and Laws of Minnesota, 1935, Chapter 268, which

requires all prison made goods offered for sale within the State to be branded and marked as such and providing penaltes for sales in violation thereof. These laws are printed in full in the appendix.

The enforcement of the Ashurst-Sumners Act of Congress of July 24, 1935, 49 Stat. 494, 49 U. S. C. A. §§ 61, 64, will aid substantially in the enforcement of the laws of Minnesota requiring convict made goods to be plainly labeled as such stating the prison of origin for the reason that all convict made goods sold in Minnesota, except the products of the State Prison of Minnesota, are shipped in from other States. Much of such goods are so shipped into Minnesota from other States in successful evasion of the laws of Minnesota. In every instance, it is difficult to ascertain that such goods are convict made, their origin and to obtain evidence and witnesses available for prosecutions in the State courts. Interested witnesses will not come into the jurisdiction of Minnesota from the States in which the prisons are located, in which the prison made goods are made, voluntarily to testify. Federal law enforcement agencies have the power and personnel necessary to deal adequately with this problem in the respects in which State power is inadequate or wanting. The situation is not unlike that which induced Congress first to pass the Wilson Act and then the Webb-Kenyon Act with respect to intoxicating liquors.

ARGUMENT.

The Ashurst-Sumners Act contains two parts, viz;

(1) A provision that it shall be unlawful to transport, or cause to be transported, any goods, wares, or merchandise manufactured or produced by convicts or prisoners, with certain exceptions, from one State or territory to another State or territory in the United States, where such goods, wares or merchandise are intended by any person interested therein to be received, possessed, or sold, either in the original package or otherwise, in violation of any law of such State or territory; and

(2) A provision that all packages containing any such convict made goods shall be plainly and clearly marked so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced may be readily ascertained on an inspection of the outside of such package.

I.

THE PROVISIONS OF THE ASHURST-SUMNERS ACT PROHIBITING THE TRANSPORTATION IN INTERSTATE COMMERCE OF CONVICT MADE GOODS INTO ANY STATE IN VIOLATION OF ITS LAWS ARE A CONSTITUTIONAL EXERCISE OF THE POWER OF CONGRESS TO REGULATE COMMERCE AMONG THE STATES BY PREVENTING THE USE OF THE FACILITIES OF INTERSTATE COMMERCE TO CAUSE EVIL BY TRAFFIC IN CONVICT MADE GOODS.

Traffic in convict made goods in competition with goods made by free labor is an evil which the States may suppress by the exercise of their police power.

Whitfield v. Ohio, 297 U. S. 431, 439-40.

The evil of traffic in convict made goods is recognized by this Court to be of such a grave character as to make applicable thereto the rules applied to traffic in intoxicating liquors and by the application of these rules to uphold the power of Congress by the Hawes-Cooper Act to remove the impediment to State control presented by the unbroken-package doctrine to interstate shipments.

Whitfield v. Ohio, supra, page 440.

The Ashurst-Sumners Act bears the same relation to traffic in convict made goods that the Webb-Kenyon Act bears to traffic in intoxicating liquors. The Wilson Act relating to intoxicating liquors and the Hawes-Cooper Act relating to convict made goods are almost identical in language and have for their purpose the making of State laws regulating the respective traffics more effective by removing the impediments of the unbroken-package doctrine, which gave to such shipments the protection of interstate commerce law, which resulted in freedom from State action. Just as the ineffectiveness of the Wilson Act made it necessary to pass the Webb-Kenyon Act to preserve to the States their freedom to establish and enforce their own laws with respect to traffic in intoxicating liquors, it also became necessary to enact the Ashurst-Sumners Act with respect to convict made goods. In each case the shipment of goods into a State to be received, sold or used in violation of its laws is prohibited by the Federal law.

This Court has already held that traffic in convict made goods is an evil subject to State and Federal regulation. It has held that the traffic may be entirely prohibited by the States and that Federal legislation depriving such goods upon arrival in a State of the protection of the interstate commerce law is a proper regulation of such commere by Congress. The

rules applicable to convict made goods were said by this Court to be "akin" to those which govern intoxicating liquors. In Whitfield v. Ohio, supra, at page 440, this Court said:

> "If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is clear that the removal of that impediment in the case of prison-made goods must be upheld for reasons akin to those which moved this court to sustain the validity of the Wilson Act."

If the traffic in convict made goods is an evil, the manner and extent of the regulation of such traffic is for the Congress to decide. It may prohibit shipments in interstate commerce into a State of convict made goods upon the same principle that it may prohibit the shipment of intoxicating liquors into a State in violation of its laws. Such laws are sustained as regulations of interstate commerce. The principles governing this case were announced by this Court in the case of Clark Distilling Company v. Western Maryland Railway Company, 242 U. S. 311, in which this Court sustained the constitutionality of the Webb-Kenyon Act. The Court pointed out in the opinion that intoxicating liquors are a proper subject of regulation. We have already pointed out that this Court has held that prison made goods are also a subject of regulation in the case of Whitfield v. Ohio, supra. Then the Court pointed out at page 325-326 that the regulation may take the form of an absolute prohibition of traffic there in interestate commerce. The Court then pointed out that inasmuch as Congress has the power to prohibit the movement of intoxicants in interstate commerce, it cannot be held that it exceeded its authority by regulating the traffic to the extent of permitting the prohibitions of one State to prevent the use of interstate commerce to ship liquor from another State. p. 327. Analogy, if Congress

has the power to prohibit traffic in convict made goods, it can regulate that traffic in such a manner as to permit the prohibitions of one State to prevent the use of interestate commerce to ship convict made goods from another State. The Court pointed out that the regulations of the Webb-Kenyon Act produce cooperation between the local and national governments so as to preserve the right of each. pp. 331-332. This is precisely what the Ashurst-Sumners Act does with respect to convict made goods.

It is no answer to the arguments which have been advanced that convict made goods are harmless in themselves and that, therefore, the regulations of the Ashurst-Sumners Act exceed the power of Congress to regulate interstate commerce. Congress may adopt regulations of interstate commerce in the nature of police regulations.

In Hoke v. United States, 227 U. S. 308, in which this Court upheld the White Slave Traffic Act of 1910, it was held that the means adopted to regulate interstate commerce "may have the quality of police regulations." p. 323.

In Brooks v. United States, 267 U. S. 432, the Dyer Act prohibiting the interstate transportation of stolen motor vehicles was upheld. In that case Chief Justice Taft, speaking for the Court, said:

> "The objection to the Act cannot be sustained. Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."

The transportation of the women in the White Slave Case, Hoke v. United States, supra, and the transportation of the stolen automobile in the Brooks case, supra, were not in and of themselves harmful. It was the traffic in the transportation of women for immoral purposes and debauchery and the traffic in stolen automobiles by nation-wide rings of criminals and the use of the facilities of interstate commerce to facilitate such immoral, harmful and illegal traffic in each of the cases mentioned which justified Congress in exerting its power to police interstate commerce and prevent its facilities from being used for such purposes. The same argument applies to the use of the facilities of interstate commerce to promote and carry on business in convict made goods. Even though the goods themselves be harmless and innocuous, nevertheless, traffic in such goods is an evil and is ruinous to free labor and a fraud upon the public. The Congress is justified in using its power to prevent the facilities of interstate commerce from being used to carry on the evil traffic in convict made goods for the same reasons that it is justified in preventing an evil traffic in transporting women and stolen automobiles.

It is upon these grounds that interstate traffic in adulterated and misbranded foods may be prohibited by Act of Congress, Hipolite Egg Company v. United States, 220 U. S. 45, and that interstate and foreign commerce in fight films may be suppressed by Act of Congress, Freed v. United States, 239 U. S. 325.

In the Lottery Case, 188 U. S. 321, it was held that Congress may prohibit under its power to regulate commerce among the States the interstate transportation of lottery tickets. It was pointed out in that case that lottery tickets in and of themselves are not harmful but that they are the means by which a harmful traffic may be carried on. In that case it was held that Congress in regulating interstate commerce

may "provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another." p. 356. It was further held that such legislation only supplemented the laws of the States. p. 357.

II.

THE PROVISIONS OF THE ASHURST-SUMNERS ACT REQUIRING THAT CONVICT MADE GOODS TRANSPORTED IN INTERSTATE COMMERCE BE PLAINLY LABELED ARE A CONSTITUTIONAL EXERCISE OF THE POWER OF CONGRESS TO REGULATE COMMERCE AMONG THE STATES BY PREVENTING THE USE OF THE FACILITIES OF INTERSTATE COMMERCE TO CAUSE EVIL BY TRAFFIC IN CONVICT MADE GOODS.

The power of Congress to adopt police regulations within the scope of its power to regulate interstate commerce includes the power to require that goods be labeled so as to prevent deceit and fraud being perpetrated upon the public as a result of such commerce.

Hipolite Egg Company v. United States, 220 U. S. 45, supra.

Traffic in convict or prison made goods is attended with fraud, deception and unfair trade practices. These consist in many instances of labels upon said products which would lead the purchaser to believe that the same were manufactured in a factory by a regular manufacturer employing free labor. We feel confident in the assertion that, in the absence of legislation requiring it, such goods never bear a label showing that they are made in a prison or by convict labor. As a matter of fact the contracts of the contractors with the prison authorities for such products generally contain a clause that the contractor

shall have a right to rescind the contract if Federal or State legislation shall be enacted requiring a label to show the origin of such goods or that they are made by convict labor. Such a contract is printed in full in the case of Rice v. State, 108 Okla. 4, 232 Pac. 807. That contract was one between the Cherokee Manufacturing Company and the State of Oklahoma by which the State agreed to manufacture certain shirts and garments for the company. In the contract it is provided that labels shall be attached and that the cloth and all other goods used in the manufacture of the garments shall be subject to the approval of the company. These goods are then sold by the company as its product. To protect itself against such legislation Section 8 of the Contract, which is printed in the opinion, provides that the company shall have a right to cancel the contract if Federal or other legislation shall require it to label its goods so as to show that they were made in a prison. These goods are marketed not as prison made goods, but as the goods of a manufacturer.

That this is an unfair trade practice and a deception and fraud upon the public is established by all the decisions. In short the contracts entered into between prison contractors and the prison authorities disclose a purpose to perpetrate frauds and deception upon the public as to the origin of such goods and the labor by which they are produced and reserve a right to the contractor to rescind such contracts when that purpose to deceive and defraud cannot be exercised by reason of the enactment of State and Federal laws which prevent such fraud and deception.

The trial judge in this case, Judge Hamilton, in his written opinion, gave expression to this thought in the following language:

"It has been the practice in some instances of persons dealing in convict made goods to represent that the manufacturing was done in free institutions and by skilled labor. The Federal Trade Commission has found this to be an unfair trade practice. See the proceedings of that body in the matter of Commonwealth Manufacturing Company and Harry Dushoff, doing business under the trade names and styles of Harry Dushoff & Company, and Chicago manufacturing Company, Docket No. 1367.

"Usually the place of manufacture of an article is disclosed as a matter of advertising and good will, and so far as I know no producer of a product in general use and sale has sought to conceal the place of production. The fact that the plaintiff in the case at bar contends that his business would be destroyed if required to label his product is strongly persuasive that the buying public attaches great importance to the place of manufacture, and a regulation requiring labeling is not in conflict with the Constitution.

"The framers of the Constitution never intended that the power lodged in the Congress to legislate should be subject to the control of the Judiciary if there was a basis for the Congressional action, no matter how slight in fact it might be. It is only necessary for me to decide in this case that there was a slight basis for the Act of Congress in requiring the labeling of the plaintiff's product when tendered for shipment in interstate commerce, and such a basis undoubtedly existed. Courts have many times sustained legislation essentially similar to the Act here in question."

A representation by one marketing goods that he is a manufacturer when he is not is a deception and fraud and unfair practice, which may be suppressed by the exercise of governmental power. It was held that Congress may suppress such practices in interstate commerce through the Federal Trade Commission by this Court in the case of Federal Trade Commission v. Royal Milling Company, 288 U. S. 212. In that

case the respondent marketed pancake and other flour which it purchased from other manufacturers. The article was put up and sold by the defendant as its product under the name of the Royal Milling Company. It was held that the use of the words "milling company" and other words of like import would lead the purchaser to believe that he was purchasing a product of the respondent when in fact he was not and that thereby a deception was perpetrated and an unfair practice indulged in. In speaking of the practice of the defendant, this Court, at page 215, said:

> "Respondents have circulated written and printed circulars among the trade which either directly assert, or are calculated to convey the impression, that their product is composed of flour manufactured by themselves from the wheat."

Of the right of the public to know what it is purchasing, at page 216, the Court said:

> "If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin."

It held that the respondent's acts deceived the public and that the Federal Trade Commission was justified in making an order to desist from using the words "milling company" or other words of like import and at page 217 the Court further said:

> "The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of the opinion that the purchasing public is entitled to

be protected against that species of deception, and that its interest in such protection is specific and substantial."

Not only are prison made goods sold under labels which do not disclose their origin and which deceive the public into believing that they are made in factories instead of prisons, but in many cases as the records of the Senate Committee disclose, such goods bear false labels and are dumped into the markets of the States to demoralize and ruin business. Rep. No. 344, U. S. Senate 70th Congress, 1st Session, Page 4. It is a well known fact, too, that these goods are dumped upon the markets by dealers at sales which are widely advertised, in which the dealers assert that they have purchased a large quantity or an entire output of such products. People are led to believe that the merchant has purchased the entire output of a manufacturer and that he is enabled to charge a low price for the goods because of the large purchase which he has made. The fact of the matter is that the merchant is enabled to charge a low price because the goods are prison or convict made and this fact is carefully concealed from the public.

The right of regulation exists even though no private rights are invaded. The public has rights in this respect which can be and are protected by legislation. In Federal Trade Commission v. Klesner, 280 U. S. 19, at page 27, this Court said:

> "But to justify the Commission in filing a complaint under §5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. Public interest may exist although the practice deemed unfair does not violate any private right. In Federal Trade Commission v. Beech Nut Packing Co., 257 U. S. 441, a practice was suppressed as being against public policy, although no private right either of a trader or of a purchaser appears to have been invaded."

To the same effect is Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483.

In Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67, it was held that the marketing of California Pine as White Pine is a deception and a fraud and unfair practice which the Federal Trade Commission was justified in suppressing. This decision emphasizes the right of the public to get what it chooses, even though the choice may be dictated by caprice or by fashion or even by ignorance. At page 78 this Court says:

> "Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. Federal Trade Comm'n v. Royal Milling Co., 288 U. S. 212, 216; Carlsbad v. W. T. Thackeray & Co., (C. C.) 57 Fed. 18. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."

In Sears, Roebuck & Company v. Federal Trade Commission, (7th CCA) 258 Fed. 307, 6 A. L. R. 358, the petitioner was found guilty of having indulged in unfair trade practices which the Commission had suppressed. These consisted of representations of buying sugar, coffee and tea in large quantities from producers, even in foreign countries, and that by reason thereof petitioner was able to sell the same at a lower price than its competitors. The inference was that petitioner's competitors overcharged the public. It was held in that case that one may be found gulity of intentionally injuring and discrediting competitors by falsely leading the public to believe

that they were unfair dealers by falsely advertising that because of petitioner's handling commodities in large quantities and buying direct from manufacturers and producers his goods cost less and therefore could be sold for less. The order of the Federal Trade Commission that petitioner desist from such practice was sustained. The decision in this case denounces the practices, which attend the traffic in prison made goods—misrepresentations as to the origin of goods, which in the case at bar consists of representing the goods as being those of manufacturers instead of being prison made; that the price is low by reason of purchases by dealers of large quantities or entire outputs of factories instead of their being low on account of being prison made, and causing labels to be attached which are calculated to convey the impression that the goods are made by a manufacturer in a factory instead of in a prison by convicts. In short the practices of prison contractors and merchants, who dispose of prison made goods, are of such character as to justify the exertion of the police power to regulate and suppress them.

That the public has a right to be advised as to the goods which it purchases is well settled. Nobody has a right to represent his goods as the goods of somebody else. Nobody has a right to make any false, misleading or deceptive representations as to his goods. It is not necessary that an express representation be made. It is sufficient if the goods are marked in such a way as to result in the public's being deceived or misled.

In Charles Broadway Rouss, Inc., v. Winchester Co., 300 Fed. 706, at page 715, the Court says:

> "As Lord Halsbury said in Reddaway v. Banham (1896) A. C. 199, nobody has any right to represent his goods as the goods of somebody else. That principle of

law underlies all the decisions in the cases involving unfair competition."

In Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 673, Chief Justice Fuller said:

> "In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those, and other goods; and protection is accorded against unfair dealing, whether there be a technical trade mark or not. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

In the case of Corn Products Refining Company v. Eddy, 249 U. S. 427, a statute of Kansas requiring that all syrup compounds be branded and labeled so as to show the ingredients thereof was held to be constitutional. At page 431 Justice Pitney said:

> "And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold.
>
> "Evidently the purpose of the requirement is to secure freedom from aduleration and misbranding; the mischief of misbranding being that purchasers may be misled with respect to the wholesomeness or food value of the compound. And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth."

Statutes of Iowa and Pennsylvania providing that manufacturers of ice cream shall state the butter-fat content thereof

were held to be constitutional in Hutchinson Ice Cream Company v. Iowa, 242 U. S. 153, in which this Court said:

> "Laws designed to prevent persons from being misled in respect to the weight, measurement, quality or ingredients of an article of general consumption are a common exercise of the police power."

A similar State statute of North Dakota requiring the labeling of lard so as to state the ingredients thereof and the sale of it in cans containing 1, 3 or 5 pounds or multiples thereof was held to be constitutional in Armour & Co. v. North Dakota, 240 U. S. 510.

In Heath & Milligan Manufacturing Company v. Worst, 207 U. S. 338, a statute of North Dakota requiring the labeling of paint containers and stating the ingredients of the paint was held to be constitutional.

In Savage v. Jones, 225 U. S. 501, a statute requiring the labeling of commercial feeding stuff, stating the ingredients thereof, was held to be constitutional.

In State v. Buck Merc. Company, 38 Wyo. 47, 57 A. L. R. 675, a statute was upheld which required the disclosure by label of materials or ingredients of certain articles sold and to specify the wool content thereof. Numerous other instances could be cited—

> Schmidinger v. Illinois, 226 U. S. 578 (weight of bread);
>
> Stolz v. Thompson, 44 Minn. 271, (contents of baking powder);
>
> State v. Aslesen, 50 Minn. 5; (contents of lard substitutes);
>
> State v. McKay, 137 Tenn. 280, Ann. cas. 1917 E. 158 (purity of seeds).

In Parrott & Company v. Benson, 114 Wash. 117, 194 Pac. 986, the Court said:

> "We cannot hold anything to be unjust discrimination or unreasonable restriction which requires merchandise to be sold for just what it is, and prevents its sale as something other than it is."

These authorities establish beyond any doubt that the business of dealing in prison or convict made goods is attended with evils that justify the exertion of the police power to suppress them and protect the public. Such a police power is comprehended within the power of Congress to regulate interstate commerce. The Ashurst-Sumners Act is such a police regulation and, therefore, is constitutional.

III.

THE ASHURST-SUMNERS ACT DOES NOT VIOLATE THE RIGHTS RESERVED TO THE STATES BY THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is sometimes claimed in this respect that the Ashurst-Sumners Act violates the Tenth Amendment because it closes the doors of interstate commerce to goods which are in themselves harmless and thus imposes a State policy upon the States with respect to traffic in convict made goods. This argument is decisively answered by the Court below in the last two paragraphs of the opinion. In the second to the last paragraph of the opinion the Court below distinguished the Child Labor Cases and pointed out that this Court was of the opinion and held in those cases that the Child Labor Acts there held to be unconstitutional constituted attempts by Congress to impress its views of a desirable State public policy upon the States. It held that in the first Child Labor Cases under the

guise of regulating interstate commerce and in the second Child Labor Case under the guise of exerting the power of taxation, Congress had interfered with a purely internal affair of the States by enacting legislation fixing a minimum age at which children should be permitted to work. The Court below further pointed out that the Child Labor Cases are not in point because the Ashurst-Summers Act does not attempt to foist or impose a State policy on the States. The act in question is a regulation of commerce among the States, but it does not invade or interfere with the power of the States to regulate their own internal affairs. It was enacted in aid of the maintenance and enforcement of State laws as was the Webb-Kenyon Act. In this respect the Ashurst-Summers Act is like the Act of Congress upheld in the Lottery Case, 188 U. S. 321, 357.

CONCLUSION.

In conclusion, it is submitted that the Ashurst-Summers Act is similar to the Webb-Kenyon Act and is to be upheld for the same reasons. Each deals with a recognized evil resulting from traffic in a certain kind of goods. The States have denounced traffic in intoxicating liquors as an evil. This Court has sustained state legislation regulating and suppressing the traffic resulting in such evil. The States have denounced traffic in convict goods as an evil. This Court has sustained State legislation regulating and suppressing the traffic resulting in such evil. By sustaining the constitutionality of the Webb-Kenyon Act, this Court laid down the principle that Congress in the exercise of its power to regulate interstate commerce, may prohibit the use of the facilities of such commerce to carry on a traffic, which results in evil. It was held that the regulation may consist of a prohibition against shipment of goods productive of evil—intoxicating liquors—into a State to be

there received, kept, possessed or disposed of in violation of the laws of such State. The Ashurst-Sumners Act seeks to apply the principles of the Webb-Kenyon Act to traffic in convict made goods, which is productive of evil, by prescribing the same regulation of prohibiting shipment thereof in interstate commerce into a State there to be received, kept, possessed or disposed of in violation of its laws. The principles which sustains the Webb-Kenyon Act sustain the Ashurst-Sumners Act.

The provisions of the Ashurst-Sumners Act requiring convict made goods to be plainly labeled as such are valid regulations of interstate commerce for the reasons just stated and for the further reason that these provisions are a means of preventing fraud and deception arising from the traffic in such goods.

The Ashurst-Sumners Act does not contravene the Tenth Amendment because it does not seek to impose any State policy upon the States under the guise of an exercise of Federal power, but simply supplements the laws of the States and has for its purpose the making of State laws more effective. It is enacted in recognition of State laws and does not in any sense conflict with or supersede them. The States continue to prescribe their own regulations and, after the States have made their own regulations, the Ashurst-Sumners Act provides that those regulations shall be made effective by prohibiting the use of the facilities of interstate commerce so as to nullify them.

Respectfully submitted,

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APPENDIX

LAWS OF MINNESOTA, 1935.

CHAPTER—267 S. F. NO. 437

An act to subject all goods, wares and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners of other states to the laws of the State of Minnesota.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Prison made goods to be subject to laws of state.—That all goods, wares and merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, (except convicts or prisoners on parole or probation,) or in any penal and or reformatory institutions transported into the State of Minnesota, and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in the State of Minnesota, be subject to the operation and effect of the laws of the State of Minnesota, to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in the State of Minnesota, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Sec. 2. Effective September 1, 1935.—This act shall take effect and be in force from and after September 1, 1935.

Approved April 24, 1935.

LAWS OF MINNESOTA, 1935

CHAPTER 268—S. F. NO. 438.

An act to require the branding or marking of prison or convict made goods, wares and merchandise offered for sale

or intended for sale in this State, providing penalties for violation thereof, and to repeal Chapter 138, Laws of Minnesota for 1929.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Prison made goods must be marked.—That all goods, wares and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, (except convicts or prisoners on parole or probation), or in any penal and/or reformatory institutions in this or any other state shall be branded, labeled or marked as hereinafter provided before being exposed for sale, and shall not be so exposed or sold without such brand, label or mark thereon.

Sec. 2. Must contain the words "Prison made."—The brand, label or mark required by Section 1 hereof shall contain at the head or top thereof the words "Prison Made" followed by the year and name of the penal and/or reformatory institution in which it was manufactured, produced, or mined in plain English lettering of the style known as great primer roman capitals. Such brand or mark, if the article will permit, shall be placed upon it and when such branding or marking is impossible, a label shall be used and attached. Such brand, mark or label shall be placed or attached outside of and on a conspicuous part of the finished article so as to be plainly visible to the purchasing public and also shall be placed outside of its box, crate or covering.

Sec. 3. Sale of unmarked goods forbidden.—That no person shall sell, offer for sale, or have in possession for the purpose of sale, goods, wares or merchandise described in Section 1 of this Act without the brand, label or mark required by this Act being placed thereon or attached thereto, or remove, conceal or deface such brand, label or mark.

Sec. 4. Violation a misdeameanor.—Any person who violates any of the provisions of this Act shall be guilty of a misdemeanor.

Sec. 5. Law repealed.—Chapter 138 of the Laws of Minnesota for 1929 is hereby repealed.

Sec. 6. Effective September 1, 1935.—This Act shall take effect and be in force from and after September 1, 1935. Approved April 24, 1935.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 138

KENTUCKY WHIP AND COLLAR COMPANY, PETITIONER

v.

ILLINOIS CENTRAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the District Court for the Western District of Kentucky (R. 29–40) is reported in 12 F. Supp. 37, and the opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 84 F. (2d) 168.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 1, 1936 (R. 48). The petition for certiorari was filed on June 29, 1936, and granted on October 12, 1936 (R. 53). The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Act of Congress approved July 24, 1935, 49 Stat. 494 (49 U. S. C. A. 6164), commonly known as the Ashurst-Sumners Act, is a valid exercise of the powers granted to Congress by the Constitution.

STATUTE INVOLVED

The Act of Congress approved July 24, 1935, c. 412, 49 Stat. 494 (49 U. S. C. A. 6164), commonly known as the Ashurst-Sumners Act, follows:

> CHAP. 412.—An Act To prohibit the interstate transportation of prison-made products in certain cases.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction

thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

SEC. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

SEC. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of

not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

SEC. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act.

STATEMENT

The decision of this cause will require a determination as to whether the Ashurst-Sumners Act is a valid exercise of the constitutional powers of Congress. Because the United States is directly interested in this question it is filing this brief *amicus curiae*.

Petitioner, by bill in equity filed on August 17, 1935, in the District Court for the Western District of Kentucky (R. 1), prayed that the respondent, a common carrier by rail, be mandatorily enjoined to accept and transport each of twenty-five separate shipments of collars and harness tendered to the respondent at its freight station at Eddyville, Kentucky, for transportation to other states (R. 23). The bill also prayed for a binding declaration of

rights between petitioner and respondent, decreeing and adjudging the Ashurst-Summers Act to be unconstitutional (R. 23).

The bill alleged the following facts: The petitioner, Kentucky Whip and Collar Company, is a Kentucky corporation engaged at Eddyville, Kentucky, in the manufacture of horse collars and strap goods, and markets the articles which it manufactures throughout the United States. In the manufacture of the articles it employs the labor of convicts confined in the Kentucky State Penitentiary (R. 1). The respondent, Illinois Central Railroad Company, an Illinois corporation, is a common carrier by rail (R. 1). The goods manufactured by petitioner and sold and shipped in interstate commerce are alleged to be "useful articles of commerce and are not in any particular whatever harmful to the health or to the peace, good order, or general welfare of the communities into which they are shipped or in which they are used" (R. 2).

Prior to the filing of the bill petitioner tendered to respondent at its freight station at Eddyville, Kentucky, twenty-five separate shipments of horse collars and harness manufactured by petitioner with prison labor at its plant in Eddyville, Kentucky, for the purpose of having the shipments transported by respondent to consignees each of whom was located in a state other than Kentucky. Ten of the shipments were consigned to customers in ten different states whose laws prohibited the

sale within their borders of any goods or merchandise manufactured wholly or in part by convict labor. Five of the shipments were intended for consignees in states whose laws require that goods made by convict labor and exposed for sale, or sold, shall be plainly marked so as to show that they are convict made. Ten of the shipments were consigned to consignees in states whose laws imposed no restriction on the sale or possession of goods made by convict labor. None of the packages or articles tendered to the respondent for transportation were labelled so as to indicate that the goods were manufactured or produced by prison labor. The respondent refused to accept or transport the shipments and upon each bill of lading endorsed the following words, "Shipment refused because prohibited by Act of Congress approved July 24, 1935" (R. 4–30). It is further alleged that it will be the policy of the respondent to continue to refuse shipments from this plaintiff of goods made by prison labor where the transportation of such shipments would violate the terms of the Ashurst-Summers Act (R. 30).

On August 24, 1935, respondent filed a motion to dismiss the bill of complaint on the grounds, among others, that the bill set forth no facts which entitled the plaintiff to relief, that the Ashurst-Summers Act is constitutional, and that the bill of complaint on its face showed a lack of equity (R. 24–25).

By stipulation the cause was submitted to the District Court for final disposition upon the bill, upon petitioner's motion for a final decree, and upon the respondent's motion to dismiss the bill (R. 25).

The District Court rendered an opinion on October 3, 1935, in which it held that the Ashurst-Sumners Act was constitutional in so far as it required the labelling of goods made by convict labor, but unconstitutional to the extent that it prohibited the shipment of such goods in interstate commerce, that the provisions of the Act were separable in this respect, and that inasmuch as none of the shipments tendered by petitioner were labelled, the bill should be dismissed (R. 29–40). The District Court made findings of fact and conclusions of law and entered a decree dismissing the bill on October 9, 1935 (R. 40–43).

The District Court's conclusions of law were in accordance with its opinion. Its findings of fact followed substantially the allegations of the bill with one important exception. The court found that petitioner's products are useful articles of commerce and not in themselves in any particular harmful to the health, peace, or good order of the communities into which they are shipped or in which they are used (R. 41), but in response to a motion by petitioner for an additional finding of fact (R. 43–44), the District Court refused to find that the articles manufactured by the plaintiff in

and of themselves are not harmful to the general welfare of the communities into which they are shipped (R. 44).

The decree of the District Court was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit on June 1, 1936 (R. 48). In its opinion the Circuit Court of Appeals held that the Ashurst-Sumners Act was constitutional in its entirety (R. 48–52).

In both the District Court and the Circuit Court of Appeals the United States appeared as *amicus curiae* and filed a brief and participated in the oral argument.

ARGUMENT

I

THE PURPOSE AND SCOPE OF THE ASHURST-SUMMERS ACT

Section 1 of the Ashurst-Sumners Act makes it unlawful for any person knowingly to transport in interstate commerce goods made by convict labor into any state where the goods are intended to be received, possessed, sold, or used, either in the original package or otherwise, in violation of the law of that state. Section 2 provides that all packages containing goods manufactured by convict labor shall be marked so that the name and address of the shipper and the consignee, the nature of the contents, and the name and location of the penal institution where the goods were produced may be readily ascertained by an inspection of the outside of the package.

At the outset it should be noted that the Ashurst-Sumners Act does not lay down a general and indiscriminate prohibition against the interstate transportation of all goods made by convict labor. On the contrary, the prohibitory provisions of Section 1 of the Act operate to prevent the shipment in interstate commerce of goods made by convict labor only in those instances where the transportation is designed to violate the laws of the several states. The statute thus bears on its face evidence that it was enacted for the same purpose, and in the same spirit, described by Chief Justice Marshall in *Gibbons* v. *Ogden,* 9 Wheat. 1, when, in referring to certain Federal laws passed to assist in the execution of the quarantine and health laws of the state, he said (p. 206):

> * * * congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states.

The problems created within the several states by the competition of goods made by convict labor with goods produced by private enterprise has been a matter of public concern for many years. The production of goods by convict labor is a produc-

tion which is either socialized or subsidized. An industry manned by convict labor may be said to be socialized when it is directly conducted by a state or some other political subdivision on its own account and the products are sold in the open market.[1] If convict labor is hired from the state by a private contractor who sells the products of that labor on the open market the contractor receives what amounts to a subsidy, because labor, and other factors of production, are furnished to him at less than their cost to private industry.[2] The dangers and difficulties which this competition presents to both the capital and the labor employed in private enterprise is a matter of common knowledge.[3] Indeed, in *Whitfield* v. *Ohio,* 297 U. S. 431, 439, this

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[1] The different methods of employing convict labor are described in *Prison Labor in the United States*, 1932, Bulletin of the United States Bureau of Labor Statistics, No. 595, 1933, pp. 4–5.

[2] See, for example, *Prison Labor in the United States*, 1932, *supra*, pp. 35–41, where figures are given showing the extremely low wages paid in state penal institutions.

[3] See the *Twentieth Annual Report of the Commissioner of Labor of the United States*, 1906, p. 25; *Convict Labor in 1923*, Bulletin of the United States Bureau of Labor Statistics, No. 372; *Prison Labor in the United States, 1932*, *supra;* see also the report made by the special committee appointed by the Honorable Herbert Hoover, when he was Secretary of Commerce, to consider the problems caused by the competition of goods made by convict labor (a summary of the report is printed in the Congressional Record, Volume 70, Part I, pp. 655–657).

The report of the Senate Committee on Interstate Commerce recommending the passage of the Hawes-Cooper Act

Court took judicial notice of the evil aspects of this competition.

Widespread legislative recognition of the problems created by this competition is shown by the fact that at the present time 32 states have enacted laws prohibiting or otherwise regulating the sale of goods made by convict labor. A list of these states is contained in Appendix A to this brief, *infra,* pp. 49–51.

A state can, of course, effectively control the labor of the convicts in its own penal institutions and the disposition of the products of their labor without aid from the national government. From the necessities of the case, however, such control when limited to the labor of the convicts in the state's own penal institutions is bound to be ineffective. Goods produced by convict labor in other states may be introduced within the borders of such a state by the instrumentalities of interstate commerce and enforcement of a restrictive or regulative policy by the state must necessarily, if it is

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contains the following statement (Senate Report No. 344. 70th Congress, 1st Session, p. 2):

> "From an entirely different viewpoint manufacturers, representing more than $2,500,000,000 in investments and employing both union and non-union labor, were heard by the Committee urging the passage of the measure for the reason, they stated, that under existing conditions the continuous production of prison-made products in certain centralized industries creates the condition by which the entire competitive market is demoralized under which the products of free manufactures are forced into ruinous competition with goods made by convicts.

to be effective, apply to such goods. It is elementary, however, that no state in its attempts to enforce its domestic policy may unconstitutionally impede or burden interstate commerce because by the Constitution the power to regulate that commerce is committed solely to the Federal Government. As a result of the conflict of state legislative policy with the constitutional power of the Federal Government to regulate interstate commerce the several states have been severely handicapped in their attempts to deal with the problem of convict-made goods. Prior to its decision in *Whitfield* v. *Ohio*, 297 U. S. 431, this Court had never passed upon the power of a state to prohibit or otherwise regulate within its borders the sale of such goods when brought into the state through the channels of interstate commerce. In at least three states, however, statutes which merely regulated and did not absolutely prohibit the sale of goods made by convict labor were held by state courts to be unconstitutional under the Federal Constitution, as applied to such goods brought from other states, on the ground that such regulations unconstitutionally impeded and burdened interstate commerce.[4]

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[4] In Ohio and New York statutes requiring such goods to be labelled were held unconstitutional on the ground that they unduly impeded and burdened interstate commerce. See *People* v. *Hawkins*, 157 N. Y. 1, 51 N. E. 257, and *Opinions of the Justices*, 211 Mass. 605, 98 N. E. 334. In Ohio a statute requiring dealers in goods made by convict labor to obtain a license was held invalid on similar grounds. See *Arnold* v. *Yanders*, 56 Ohio 417, 47 N. E. 50.

It was with this legislative and constitutional background in mind that Congress determined to use its power over interstate commerce to prevent the instrumentalities and channels of that commerce from being used to evade and defy the domestic policy of the states as embodied in state law. The first statute passed by Congress dealing with interstate commerce in goods made by convict labor was the Act of Congress of January 19, 1929, 49 U. S. C. A. 60, commonly known as the Hawes-Cooper Act. That Act provided that goods made by convict labor and transported into any state should upon arrival and delivery in that state be subject to its laws, to the same extent as though such goods had been produced within the state and should not be exempt from the operation of those laws by reason of being sold in the original package.

The report of the Senate Committee on Interstate Commerce, recommending the passing of the Hawes-Cooper Act, summarizes the conditions which prompted this legislation in the following language (Senate Report No. 344, 70th Cong., 1st Sess., p. 4):

> State laws against such deception and fraud are ineffective. State labeling laws and similar legislation are unenforceable, and the objectionable conditions which exist are permitted to continue only because States can not enforce their own statutes.
>
> The State, representing the public opinion of that State by enacting laws through its

legislature to prevent the sale of convict-made goods, is powerless to enforce its own will, because other States use its market as a dumping ground for surplus convict-made goods.

With the result that New York (for illustration) regulates the sale of convict-made goods, and the products of its own convicts are eliminated from the State market, but at present the prison contractor may dump upon the New York market the products of convicts from other States.

* * * * *

The result is apparent. The products of convicts are not sold upon the market where "State use" is in force and yet every other State where the contract system is used may do the thing that the law of that State prohibits.

The bill therefore does not interfere with the rights of States, but it does assist in preserving the right of self-determination for each State.

The constitutionality of the Hawes-Cooper Act was upheld by this Court in *Whitfield* v. *Ohio*, 297 U. S. 431.

The Ashurst-Sumners Act was enacted to advance the same legislative policy which prompted the enactment of the Hawes-Cooper Act, by prohibiting the use of the channels and instrumentalities of interstate commerce for the purpose of evading or violating state laws. In recommend-

ing the passage of the Ashurst-Sumners Act the Committee on the Judiciary of the United States Senate stated this policy in the following words (S. R. No. 906, 74th Cong., 1st Sess.): [5]

> The Committee on the Judiciary, to whom was referred the bill (S. 2904) to prohibit the interstate transportation of prison-made goods in certain cases, having considered the bill, report it favorably without amendment and recommend that it be passed.
>
> For many years the Congress has considered bills relating to the sale of prison-made goods. Extensive hearings have been held on these measures which have thoroughly revealed the evils attending the sale of such goods, in the open market, in competition with goods manufactured and produced by free labor. These evils impelled the Congress in 1929 to enact the Hawes-Cooper law, by virtue of which prison-made goods, upon their entry and delivery into a State, became subject to the laws of that State.
>
> At present 21 States, with a population in excess of 75 millions, have enacted laws prohibiting the sale, in the open market, of prison-made goods. This bill is designed to prohibit the transportation of such goods

[5] The Committee on Labor, of the House of Representatives, in recommending the passage of the Act said (74th Cong., 1st Sess., House of Representatives, Report No. 920):

> The present bill H. R. No. 7940 carries further the policy of the Hawes-Cooper Act by supplying a Federal enforcement act to supplement State legislation.

into the States which have thus legislated, in cases in which such goods are to be received or used in violation of the State law. The principle involved in this bill has been frequently sustained by the Supreme Court of the United States. Consequently the members of the committee believe beyond the peradventure of a doubt that the bill is constitutional.

In view of the legislative history of this statute and the avowed motives which prompted its enactment no question can arise as to its purpose. It is not an attempt by Congress to force upon any state, either directly or indirectly, the adoption of a particular policy with respect to the sale or use of goods made by convict labor. On the contrary, the action of Congress in exercising its constitutional power over the instrumentalities and channels of interstate commerce so as to prevent those channels and instrumentalities from being used to evade, to disregard, and to defy the laws of the several states, is an express recognition of the right of each state to adopt whatever policy it may choose with respect to the sale or use of such goods and to effectively enforce that policy within its own borders.

The history of Congressional legislation with respect to interstate commerce in goods made by convict labor parallels the history of Congressional legislation with respect to interstate commerce in intoxicating liquors. In 1890 Congress passed the

Wilson Act (c. 728, 26 Stat. 313) which provided that intoxicating liquor transported into a state should, upon arrival in a state, be subject to the operation and effect of the laws of the state to the same extent and in the same manner as though the liquor had been produced in the state, and should not be exempt from those laws by reason of being introduced into the state in the original package. The parallel with the Hawes-Cooper Act is obvious. The constitutionality of the Wilson Act was sustained by this Court in *In re Rahrer*, 140 U. S. 545. In 1913 Congress supplemented the Wilson Act by enacting the Webb-Kenyon Act (c. 90, 37 Stat. 699), which regulated interstate commerce in intoxicating liquor in substantially the same way in which the Ashurst-Sumners Act regulates interstate commerce in goods made by convict labor.[6] That is to say, the Webb-Kenyon Act made it unlawful to transport intoxicating liquor into a state when the liquor was intended to be used or sold, in the original package or otherwise, in violation of state law. The constitutionality of the Webb-Kenyon Act was sustained by this Court in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311.

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[6] It should be noted that in 1909 Congress passed a labeling statute comparable in some respects to Section 2 of the Ashurst-Sumners Act. The statute (March 4, 1909, c. 321, 35 Stat. 1137) made it unlawful to ship packages of liquor in interstate commerce unless the packages were labeled on the outside so as to plainly show the name of the consignee, the nature of the contents, and the quantity contained therein.

II

SECTION 1 OF THE ASHURST-SUMMERS ACT IS A VALID EXERCISE OF THE POWERS OF CONGRESS

A. THE CONSTITUTIONALITY OF SECTION 1 FOLLOWS FROM THE DECISIONS OF THIS COURT IN WHITFIELD v. OHIO, 297 U. S. 431, AND CLARK DISTILLING CO. v. WESTERN MARYLAND RAILWAY CO., 242 U. S. 311

Section 1 of the Act forbids interstate transportation of goods made by convict labor if the goods are intended to be sold or used in violation of the laws of the state of their destination.

The power of Congress to enact regulations concerning interstate commerce in goods made by convict labor is established by the decision of this Court in *Whitfield* v. *Ohio,* 297 U. S. 431. In that case Whitfield had been charged with violating an Ohio statute which forbade the sale in the open market of goods made by convict labor. The information laid against Whitfield contained two counts. The first count charged that he had sold on the open market in Ohio goods made by convict labor in Alabama. The second count charged that he sold such goods in Ohio for shipment and delivery by railway express from a point in Alabama. It was stipulated that the goods referred to in the first count were sold in the original package. Whitfield was convicted in the courts of Ohio, and he then petitioned for and obtained a writ of certiorari. On his behalf it was argued before this Court that the Ohio statute was an unlawful regulation of and burden upon interstate commerce. The

Court upheld the conviction on the first count of the information, and because that count considered alone was sufficient to support the penalty inflicted upon Whitfield, found it unnecessary to consider the second count. In its opinion this Court said (pp. 439–440):

> The view of the State of Ohio that the sale of convict-made goods in competition with the products of free labor is an evil finds ample support in fact and in the similar legislation of a preponderant number of the other states. Acts of Congress relating to the subject also recognize the evil. In addition to the Hawes-Cooper Act, the importation of the products of convict labor has been denied the right of entry at the ports of the United States and the importation prohibited. C. 497, Sec. 307, 46 Stat. 689; Title 19 U. S. C. (1934 ed.), Sec. 1307. And the sale to the public in competition with private enterprise of goods made by convicts imprisoned under federal law is forbidden. C. 340, Sec. 5, 46 Stat. 391; Title 18 U. S. C. (1934 ed.), Sec. 744 c.
>
> All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned, by non-discriminating legislation, to preserve

> its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument. The proposition is not contested that the Ohio statute would be unassailable if made to take effect after a sale in the original package. And the statute as it now reads is equally unassailable, since Congress has provided that the particular subjects of interstate commerce here involved "shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case", *In re Rahrer, supra,* p. 562, namely, upon arrival and delivery.

Two conclusions follow from this language:

1. A state has the right and power under the Federal Constitution to prohibit the sale within its boundaries of goods made by convict labor, if that prohibition does not illegally discriminate against the citizens of other states, and subject to such limitations as may arise by reason of the paramount power of Congress to regulate interstate commerce.

2. In the exercise of its power to regulate interstate commerce, Congress can divest goods made by convict labor of the immunity which they enjoy as objects of interstate commerce and subject them to state regulation at an earlier point of time than would be the case in the absence of Congressional legislation.

Putting aside for the moment the question of due process of law which will be considered later

in this brief, the Court's attention is directed to the significance of this decision in relation to the scope of the power of Congress to regulate interstate commerce.

In sustaining the constitutionality of the Hawes-Cooper Act this Court relied on the authority of *In re Rahrer,* 140 U. S. 545. That decision sustained the constitutionality of the Act of August 8, 1890, c. 728, 26 Stat. 313, commonly known as the Wilson Act, which provided that intoxicating liquor carried in interstate commerce into a state should be subject to the laws of that state and not exempt because of its introduction in the original package or otherwise. This Court indicated that the reasoning which led to the sustaining of the Wilson Act was equally applicable to the Hawes-Cooper Act. The Court said (p. 440):

> If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is clear that the removal of that impediment in the case of prison-made goods must be upheld for reasons akin to those which moved this court to sustain the validity of the Wilson Act.

The parallel between the Wilson Act and the Hawes-Cooper Act is of great significance because of the subsequent legislative and judicial history of liquor legislation. After this Court had sustained the constitutionality of the Wilson Act,

Congress enacted the Webb-Kenyon Act of March 1, 1913, 37 Stat. 699, which made it unlawful to transport intoxicating liquor into a state if the liquor was to be possessed, sold, or used there in violation of state law. This statute made precisely the same provision with respect to intoxicating liquor that Section 1 of the Ashurst-Sumners Act makes with respect to goods manufactured by convict labor. The constitutionality of the Webb-Kenyon Act was sustained by this Court in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311.[7] In its opinion this Court said (p. 330):

> As the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity, * * *.

If, as this Court stated in the language just quoted, the constitutionality of the Webb-Kenyon Act inevitably followed from the decision in *In re Rahrer*, 140 U. S. 545, then the conclusion is inescapable that the constitutionality of the Ashurst-Sumners Act inevitably follows from the decision

[7] See also *U. S.* v. *Hill*, 248 U. S. 420, and *McCormick* v. *Brown*, 286 U. S. 131.

in *Whitfield* v. *Ohio,* 297 U. S. 431. The one statute is but a larger exertion of the identical power brought into play in the other.

Petitioner's only answer to the logic of this conclusion appears to be that although under the Constitution goods made by convict labor may be subjected to the Hawes-Cooper Act, the "harmless and useful" nature of such goods removes them from the scope of the commerce power, when that power is exercised in the Ashurst-Sumners Act.

Before proceeding to an exposure of the arbitrary and artificial basis upon which this contention of petitioner rests, it will be well to consider the anomalous results which must follow its acceptance. This Court has held, *Whitfield* v. *Ohio,* 297 U. S. 431, that Congress can legislate with respect to goods made by convict labor even though the transportation of those goods in interstate commerce has ceased and the goods are resting in the original package in the hands of the consignee. In that case the practical effect of the Ohio and Federal laws which were upheld was obviously to prevent in a large measure the transportation into Ohio from other states of goods made by convict labor. Petitioner now contends that because of the inherent qualities of convict-made goods Congress cannot pass restrictive and prohibitory legislation with respect to such goods when they are still moving in interstate commerce. Petitioner's contention appears to come to this: It

is constitutional for Congress to consent to state interference with interstate commerce in convict-made goods, but it is unconstitutional for Congress itself to undertake regulation of that commerce. No explanation is advanced as to why the supposed immunity created by the character of the goods should curtail the one exercise of Congressional power and not the other. Indeed, the arbitrary and unreasonable operation of this asserted principle of immunity tends to create the impression that its character is dictated by the exigencies of argument rather than by considerations of logic or authority.

Petitioner suggests that the possession of goods in the original package is a mere incident of interstate commerce and is not an essential part of that commerce in the sense in which transportation is (Pet. brief, pp. 29–31).[8] It is hardly reasonable

[8] At one point in its brief petitioner appears to suggest that the decision in *Whitfield* v. *Ohio*, 297 U. S. 431, could be explained as a limitation on the original package doctrine and that consequently it was not necessary in that case for this Court to pass upon the constitutionality of the Hawes-Cooper Act. (Pet. brief, pp. 29–33.) After having referred to its decision in *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, the Court clearly stated, however, that its decision rested on the Hawes-Cooper Act and not on a limitation of the original package doctrine. After quoting from its opinion in *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, the Court said (p. 440):

> Whether that view of the doctrine as applied to state taxation should now be given a more general application, the Hawes-Cooper Act, being determinative of the case now under review, makes it unnecessary for us to decide.

to suppose, however, that the power of Congress over goods made by convict labor is greater when it legislates with respect to the mere incidents of interstate commerce than when it legislates as to commerce itself. To accept that supposition would be to establish the novel constitutional doctrine that the scope of the commerce power becomes greater as the subject matter on which it operates recedes from the current of interstate commerce.

B. PETITIONER'S ARGUMENT ASSUMES, WITHOUT WARRANT, THAT THE USE OF THE INSTRUMENTALITIES OF INTERSTATE COMMERCE FOR THE PURPOSE OF VIOLATING STATE LAWS IS LEGITIMATE AND PROPER

Petitioner's insistence throughout its brief that goods made by convict labor are useful and harmless articles of commerce, serves to obscure the evil character of the commerce which is prohibited by Section 1 of the Act. The evil arises from the fact that the disposition for which the goods are destined is one which the state of destination in the exercise of its power to protect its own general welfare has declared to be illegitimate within the state. It may be conceded that the evil thus arises from the unlawful use to which the objects of the commerce are to be put and not from inherent qualities of those objects themselves. but that concession does not disprove the evil or remove it from the scope of the commerce power.

The determination of whether the local sale of goods made by convict labor is inimical to the public welfare is a matter committed to the discre-

tion of the legislative bodies of the several states. Thirty-two states have passed laws forbidding or otherwise regulating the sale, within their borders, of goods made by convict labor. In *Whitfield* v. *Ohio,* 297 U. S. 431, 439, this Court recognized the right of the states to adopt such regulative and restrictive legislation. Petitioner may be persuaded that the states which have adopted this legislation have acted upon an erroneous conception of the general welfare. That fact is not important. Whatever merit there may be in petitioner's view as to the relation between the general welfare of the states and the sale of goods made by convict labor, that view is not one which the Federal Constitution requires the states to accept.

Petitioner appears to admit that Congress can close the channels of interstate commerce to articles which because of "their inherent nature or *their intended use*" are inimical to the health, safety, morals, or "*general welfare of the public.*" [Italics supplied.] (Pet. brief, p. 15.) Goods made by convict labor and intended for use or sale in violation and defiance of the laws of a state are goods whose intended use is inimical to the general welfare of that state and it was undoubtedly for this reason that the District Court refused to make a finding that the goods which petitioner sells are not in and of themselves in any particular harmful to the general welfare of the communities into

which they are shipped. Thus, even if petitioner's own definition of the scope of the commerce power is accepted, that power is wide enough to encompass legislation designed to prevent the use of the instrumentalities of interstate commerce for the evil purpose of thwarting and violating valid state laws.

Petitioner, however, takes the position that it is not possible for the goods which it sells in interstate commerce to be used in a way inimical to the general welfare of the states into which the goods are shipped. Upon examination petitioner's argument on this point appears to resolve itself into the contention that only articles which are inherently evil, deleterious, or dangerous can be inimical to the general welfare so as to fall within the scope of the commerce power. But it is no answer for petitioner to insist upon the harmless and useful qualities of prison-made goods. It is the character of the *traffic* and not the character of the *goods* which is important, as is indicated by the fact that stolen motor cars, which obviously do not differ in their inherent characteristics as objects from motor cars not stolen, may validly be barred from the channels of interstate commerce. *Brooks* v. *United States*, 267 U. S. 432. Whatever the intrinsic character of the goods may be, their transportation in interstate commerce with the intent to sell or to use them in violation of state laws is not harmless and innocent as petitioner insists.

Implicit in petitioner's legal argument with respect to the inherent qualities of goods made by convict labor is an indefensible assumption as to petitioner's right to pervert the instrumentalities of interstate commerce to improper and illegal ends. It must be admitted that no state has the power under the Constitution to prevent the use of the instrumentalities of interstate commerce for the purpose of violating its laws. Petitioner insists that the Constitution likewise forbids the Federal Government to regulate the instrumentalities of interstate commerce so as to prevent their use for that purpose. Underlying this insistence is the assumption that petitioner, as a Kentucky corporation, has a right to use the instrumentalities of interstate commerce for the purpose of violating the laws of more than half the states and that under the Constitution no power exists, either in the states or in the National Government, which can deal with that evil. And it should be noted that the evil is not one which is local in character or affects interstate commerce only indirectly, but, on the contrary, is an evil which arises from actual use of the instrumentalities of commerce and thus inheres in interstate commerce itself. This Court exposed the fallacy of a similar contention in *In re Rahrer,* 140 U. S. 545, in the following words (pp. 561, 562):

> In surrendering their own power over external commerce the States did not secure

absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.

By the adoption of the Constitution the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any State of the right to demand as between it and the others what it could not have obtained before; * * *.

* * * * *

The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge.

Petitioner's contention may thus be summarized as an assertion of the right to project the public policy of the Commonwealth of Kentucky with respect to goods made by convict labor beyond the borders of Kentucky and to enforce that policy through the instrumentalities of interstate commerce within the borders of other states in defiance of laws which those states have adopted pursuant to a different public policy, coupled with a resolute denial that the Federal Government, which under our system of government is the only authority having jurisdiction over interstate commerce, has any power to regulate the interstate transportation

of goods so as to prevent this widespread invasion of state sovereignty. Nothing less than a peremptory command by the language of the Constitution or by the decisions of this Court could justify the acceptance of so anomalous a proposition. No such justification can be made. The premise upon which petitioner rests its entire argument has no basis either in the language of the Constitution or in the decisions of this Court.

C. IN THE EXERCISE OF ITS POWER TO REGULATE INTERSTATE COMMERCE CONGRESS CAN RESTRICT OR PROHIBIT ANY USE OF THE INSTRUMENTALITIES OF THAT COMMERCE FOR AN EVIL OR IMPROPER PURPOSE AND ITS POWER IN THAT RESPECT IS NOT LIMITED TO RESTRICTING OR PROHIBITING COMMERCE IN OBJECTS WHICH ARE INHERENTLY DELETERIOUS OR DANGEROUS

The power of Congress to regulate interstate commerce is granted by the Constitution without qualifying or restricting words. This Court has described that power as plenary and exclusive. See *Gibbons* v. *Ogden,* 9 Wheat. 1, 196–197, and *Hoke* v. *United States,* 227 U. S. 308, 320. It cannot be doubted, and indeed petitioner admits (Pet. brief, p. 18), that by the exercise of the commerce power Congress may accomplish, within the scope of the commerce power, the same purposes which may be accomplished by a state in the exercise of its police power. See *Brooks* v. *United States,* 267 U. S. 432, 436.

Numerous decisions of this Court have established that the power to regulate includes the power to prohibit. And the power to prohibit has been sustained by this Court when applied to objects not

intrinsically evil, deleterious or dangerous. Thus, a lottery ticket is merely a piece of paper which has no inherent evil qualities, yet the transportation of lottery tickets in interstate commerce may be forbidden. *Champion* v. *Ames,* 188 U. S. 321. So far as its inherent qualities are concerned, a stolen motor car is like any other car, yet the transportation of stolen motor cars in interstate commerce may be forbidden. *Brooks* v. *United States,* 267 U. S. 432. This Court has upheld the Pure Food & Drug Act not only as applied to deleterious and dangerous articles, but also as applied to articles which are merely misbranded. *Weeks* v. *United States,* 245 U. S. 618; *Seven Cases* v. *United States,* 239 U. S. 510. It was because of the evil character of the traffic regulated and not because of any inherent evil in the objects moving in that traffic that Congress enacted such legislation as the Mann Act, whose constitutionality was sustained in *Caminetti* v. *United States,* 242 U. S. 470, and *Hoke* v. *United States,* 227 U. S. 308, and the act forbidding the transportation of kidnaped persons in interstate commerce (48 Stat. 781). See *Gooch* v. *United States* (C. C. A. 10th), 82 F. (2d) 534, cert. denied April 13, 1936. None of the decisions of this Court referred to above can be squared with the notion of petitioner that there is in the nature of the commerce power itself, quite apart from any question of due process of law, a limitation which prevents that power from operat-

ing upon an article of commerce unless that article is inherently evil or deleterious as an article.

The true rule with respect to the scope of the commerce power was laid down by this Court in *Brooks* v. *United States,* 267 U. S. 432, in these words (pp. 436–437):

> Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.

In the application of this rule it may be important to determine whether Congress is actually regulating an evil which inheres in interstate commerce or is attempting to regulate something outside that commerce, but so far as the scope of the commerce power is concerned the inherent character of the objects regulated is not of controlling moment.

It is true that the evil character of the article itself might conceivably, in an appropriate case, be relevant to the question of whether a particular regulation was consistent with the due process clause of the Fifth Amendment, but that question is different from the question as to the scope of the Congressional power to regulate commerce. So far as the scope of that power is concerned

this Court has often recognized that the use of the instrumentalities of interstate commerce for the purpose of evading or violating state laws is an evil and that the power of Congress over interstate commerce may be invoked to destroy that evil.[9] See *Gibbons* v. *Ogden*, 9 Wheat. 1, 205; *Champion* v. *Ames*, 188 U. S. 321; *Hoke* v. *United States*, 227 U. S. 308, 321; *In re Rahrer*, 140 U. S. 545, 562; *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311; *Brooks* v. *United States*, 267 U. S. 432, 438–439.

In *Champion* v. *Ames*, 188 U. S. 321, this Court said (p. 357):

> In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lot-

[9] *Cf.* the Lacey Act, c. 553, 31 Stat. 187, which forbids interstate commerce in game killed in violation of local game laws. The constitutionality of this statute was sustained in *Rupert* v. *United States* (C. C. A. 8th), 181 Fed. 87. See also the Act of July 3, 1918, c. 128, 40 Stat. 755, which makes it unlawful to transport in interstate commerce any bird captured or killed contrary to the laws of a state or territory. This Statute was enforced in *Bogle* v. *White* (C. C. A. 5th), 61 F. (2d) 930. And see *Griswold* v. *The President of the United States*, 82 F. (2d) 922, where the Circuit Court of Appeals for the Fifth Circuit upheld the constitutionality of the Act of Congress approved February 22, 1935, 49 Stat. 30, commonly known as the Connally Act, which prohibits the shipment in interstate commerce of oil produced in violation of the laws of a state.

> teries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.

So far as authority is concerned, petitioner appears to hang its distinction between articles inherently safe and harmless and articles inherently dangerous and deleterious, on two pegs. (Pet. brief, p. 33.) One of these pegs is certain language used by this Court in *Clark Distilling Company* v. *Western Maryland Railway Company,* 242 U. S. 311, in disposing of the contention that a decision upholding the Webb-Kenyon Act would unwarrantedly extend the scope of the commerce power. That language follows (p. 332):

> Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to

> the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which, after all, dominates and controls the question here presented; that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been *repugnant to the great guarantees of the Constitution* but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which *under the constitutional guarantees* such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the *guarantees of the Constitution,* embrace. [Italics supplied.]

This language immediately follows a paragraph in which the Court discussed the application of the due process clause of the Fifth Amendment to the Webb-Kenyon Act. That fact, together with the circumstance that in the passage quoted above the

Court speaks of the limitation imposed "by the guarantees of the Constitution", words which the Court would hardly have used had it intended to denote an unexpressed and merely implied limitation on the scope of the commerce power, indicates plainly that the Court considered the qualities of the object regulated not as determinative of the scope of the commerce power but as relevant to a consideration of the question of due process of law.

Indeed, this Court could hardly have taken the view in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311, that intoxicating liquor was so intrinsically evil or deleterious that it was not a legitimate object of commerce without overruling certain of its own decisions. It is to be noted that this Court held, both before and after *In re Rahrer*, 140 U. S. 545, that intoxicating liquor was a legitimate object of commerce. See *Leisy* v. *Hardin*, 135 U. S. 100; *Louisville & Nashville R. R. Company* v. *Cook Brewing Company*, 223 U. S. 70, 82. Indeed, it was only because liquor was a legitimate object of commerce that such legislation as the Wilson Act and the Webb-Kenyon Act was necessary in order to enable the several states to enforce their domestic policies. If liquor, because of its inherent, deleterious, or fraudulent qualities, had not been a legitimate subject of commerce, then it is probable that the states could have regulated or restricted its sale, even in the original package.

See *Plumley* v. *Massachusetts*, 155 U. S. 461, 474; *Peirce* v. *New Hampshire*, 5 How. 504, 599–600. *Cf. Schollenberger* v. *Pennsylvania*, 171 U. S. 1.

In addition to the language of this Court in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311, the petitioner relies upon the decision of this Court in *Hammer* v. *Dagenhart*, 247 U. S. 251, and it is therefore necessary to consider that decision in its application to the instant case.

D. SECTION 1 OF THE ASHURST-SUMNERS ACT IS A REGULATION OF AN EVIL WHICH INHERES IN INTERSTATE COMMERCE; IT IS NOT AN ATTEMPT TO REGULATE A MATTER OF LOCAL CONCERN AND HENCE THE DECISION IN HAMMER *v.* DAGENHART, 247 U. S. 251, HAS NO APPLICATION IN THE INSTANT CASE

The statute which was declared invalid in *Hammer* v. *Dagenhart*, 247 U. S. 251, forbade the transportation in interstate commerce of articles produced in factories where child labor had been employed within 30 days preceding shipment. This Court held that the statute was not in fact a regulation of interstate commerce, but an attempted regulation of local production disguised as an exercise of the commerce power. This Court's view that the evil at which the statute was directed was not an evil which inhered in interstate commerce is clearly indicated by the language used by the Court in distinguishing *Champion* v. *Ames*, 188 U. S. 321, and other cases where prohibitory statutes had been sustained. The Court said (p. 271):

> In each of these instances the uses of interstate transportation was necessary to the ac-

> complishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

Unlike the Ashurst-Sumners Act, the Child Labor Law not only did not disclose by its provisions an intent to regulate an evil which inhered in interstate commerce itself, but, on the contrary, disclosed strong evidence of being enacted for the purpose of dealing with a purely local evil.[10] In contrast with the Child Labor Law the Ashurst-Sumners Act shows on its face that it is not an attempt by Congress to dictate the policy which each state shall follow within its own borders with respect to the management of its penal institutions or the sale of goods made by convict labor. Although the prohibitory provisions of Section 1 apply uniformly within the field subject to Congressional regulation, they apply only to the extent of preventing the use of the instrumentalities of interstate commerce for the purpose of violating the laws of those states which have prohibited or re-

[10] If the Child Labor Law had prohibited interstate transportation of goods made by child labor into states where their sale or disposition was forbidden by local law instead of prohibiting all interstate transportation of such goods, regardless of the laws of either the state of origin or the state of destination, the situation in *Hammer* v. *Dagenhart* would have been somewhat analogous to the case now under consideration.

stricted the sale of goods made by convict labor. Such prohibitory provisions operate within the field of interstate commerce to prevent the use of interstate transportation for the purpose of accomplishing harmful and evil results, prohibited by state laws. They cannot be said to invade the reserved powers of the states.[11]

Petitioner insists, however, that because Congress cannot legislate with respect to the local manufacture of goods by convict labor or the local sale of such goods it has no power to enact Section 1 of the Ashurst-Sumners Act (Pet. brief p. 18). If this contention is sound, the scope of the commerce power is narrow indeed. All articles of commerce necessarily have a local origin and in many instances are ultimately disposed of in local transactions. Any regulation of interstate commerce necessarily affects to some extent local origin and ultimate local disposition. But surely that circumstance does not destroy the possibility of Federal control within that field which is committed to the Federal Government by the Constitution. Congress has no power to legislate with respect to the local theft of motor cars, it

[11] The fact that the Ashurst-Sumners Act is a regulation of interstate commerce and not an attempt to exercise some other power not granted to the Federal Government serves to distinguish such decisions as those in *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44; *Linder* v. *United States*, 268 U. S. 5, 17; *United States* v. *Constantine*, 296 U. S. 287.

has no power to forbid local lotteries, it has no power to legislate with respect to the local manufacture of foods and drugs, and it has no power to legislate with respect to local immorality. Its power, however, to close the channels of interstate commerce to evils which result from such local activities is established beyond doubt.[12] The validity of an exercise of the commerce power cannot be tested by looking to see whether Congress possesses some other power which it has not attempted to exercise.

E. SECTION 1 DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

An exercise of the commerce power, like the exercise of any of the other granted powers of Congress, is subject to the limitations imposed by the due process clause of the Fifth Amendment. Those limitations require that the power shall not be exercised in an unreasonable, arbitrary, or capricious way and that the regulatory means selected shall have a real and substantial relation to the object sought to be attained. *Nebbia* v. *New York,* 291

[12] See *Hoke* v. *United States*, 227 U. S. 308, where the Court said (p. 322):

> Let an article be debased by adulteration, let it be misrepresented by false branding, and Congress may exercise its prohibitive power. It may be that Congress could not prohibit the manufacture of the article in a State. It may be that Congress could not prohibit in all of its conditions its sale within a State. But Congress may prohibit its transportation between the States, and by that means defeat the motive and evils of its manufacture.

U. S. 502, 525. In considering the question of due process of law with regard to the provisions of Section 1, it is important to note the scope of those provisions. Section 1 does not prohibit all interstate commerce in goods made by convict labor. The prohibition applies only when the goods are intended to be used in violation of state law. This limitation on the right to use the instrumentalities of interstate commerce has a real and substantial relation to the evil at which the Act is directed, that is, the use of those instrumentalities for the purpose of evading and violating state laws. It cannot be said that the provisions of Section 1 are unreasonable, arbitrary, or capricious in their operation unless it be assumed that the state legislation which calls those provisions into operation is itself unreasonable, arbitrary, or capricious. It follows that if state laws forbidding or restricting the sale of such goods are valid under the due process clause of the Fourteenth Amendment, then Section 1 must be unobjectionable under the due process clause of the Fifth Amendment.[13] It is significant that in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311, this view was taken by this Court of the relation existing between State liquor laws and the Webb-Kenyon Act. This Court said (p. 332):

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[13] The due process clause of the Fifth Amendment imposes no greater restriction upon Federal power than the due process clause of the Fourteenth Amendment imposes upon state power. *Nebbia* v. *New York*, 291 U. S. 502, 525.

> It is only necessary to point out that the considerations which we have stated dispose of all contentions that the Webb-Kenyon Act is repugnant to the due process clause of the Fifth Amendment, since what we have said concerning that clause in the Fourteenth Amendment as applied to state power is decisive.

Petitioner appears to realize that any attack on the Ashurst-Sumners Act based on the alleged denial of due process of law must be wide enough to attack state legislation prohibiting or restricting the sale of goods made by convict labor. (See Pet. brief, pp. 17–18.) So far as such a contention relates to state legislation, it is answered by the decision of this Court in *Whitfield* v. *Ohio*, 297 U. S. 431, where in its opinion this Court used language which can only mean that such state legislation does not violate the due process clause of the 14th Amendment. This Court said (pp. 439–440):

> The view of the State of Ohio that the sale of convict-made goods in competition with the products of free labor is an evil, finds ample support in fact and in the similar legislation of a preponderant number of the other states. Acts of Congress relating to the subject also recognize the evil. In addition to the Hawes-Cooper Act, the importation of the products of convict labor has been denied the right of entry at the ports of the United States and the importation prohibited. C. 497, § 307, 46 Stat. 689; Title 19

U. S. C. (1934 ed.), § 1307. And the sale to the public in competition with private enterprise of goods made by convicts imprisoned under federal law is forbidden. C. 340, § 5, 46 Stat. 391; Title 18 U. S. C. (1934 ed.), § 744c.

All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned, by non-discriminating legislation, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument. The proposition is not contested that the Ohio statute would be unassailable if made to take effect after a sale in the original package.

This approval of the Ohio statute forbidding the sale of goods made by convict labor necessarily implies approval of less drastic regulatory statutes such as those which require labeling or those which require the obtaining of a license by dealers in convict-made goods.[14]

[14] Nothing in the concept of due process of law prevents a government from requiring useful and harmless articles of commerce to be labeled so as to disclose their true character or their origin. If purchasers do not wish to buy an article if it is made by a particular manufacturer or class of manufacturers, disclosure may be required so that the purchasers can exercise their choice (*Federal Trade Commission* v.

Much of petitioner's argument appears to amount to the contention that the doctrine of due process of law prevents both the States and the Federal Government from prohibiting or regulating the sale of goods made by convict labor because those goods are not inherently dangerous or deleterious. Even if the decision of this Court in *Whitfield* v. *Ohio*, 297 U. S. 431, is disregarded, no such general proposition as petitioner advances can be sustained. Nothing in the Fourteenth or Fifth Amendments prevents a state or the Federal Government, when it acts within the scope of one of its granted powers, from regulating even harmless objects and occupations for the broad purpose of promoting the general welfare. *Nebbia* v. *New York*, 291 U. S. 502, 524. See also *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Mugler* v. *Kansas*, 123 U. S. 623, 633; *Murphy* v. *California*, 225 U. S. 623, 628. This Court has said that the power of a government is not limited, as is sometimes claimed, to the making of regulations for the promotion of such matters as health, morals, and safety, but "embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public

Royal Milling Co., 288 U. S. 212, 216), and it makes no difference that the choice may be "dictated by caprice or by fashion or perhaps by ignorance." *Federal Trade Commission* v. *Algoma Lumber Company*, 291 U. S. 67, 78.

safety." *C. B. & Q. Ry. Co.* v. *Drainage Commissioners,* 200 U. S. 561, at 592; *Eubank* v. *Richmond,* 226 U. S. 137, at 142; *Sligh* v. *Kirkwood,* 237 U. S. 52, at 59. This Court has also said that this power to promote the general welfare "may be applied to all kinds of property, even that which in its nature is harmless." *Bowman* v. *Chicago &c. Railway Co.,* 125 U. S. 465, 501.

So far as the national government is concerned, it has been pointed out above (pp. 30–31, *supra*) that many regulations of interstate commerce have been sustained by this Court which did not relate to articles of commerce which were inherently evil, dangerous or deleterious. Indeed this Court has held that in the exercise of its power to regulate interstate commerce Congress may regulate and restrict transactions in such a harmless and useful commodity as grain because there is a "public national interest" in such transactions. *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 41.

III

SECTION 2 OF THE ASHURST-SUMNERS ACT IS A VALID EXERCISE OF THE POWERS OF CONGRESS

Section 2 of the Ashurst-Sumners Act requires all packages containing goods manufactured by convict labor which are shipped in interstate commerce to be plainly and clearly marked so that the name and address of the shipper, the name and address of the consignee, the nature of the contents

and the name and location of the penal institution where the goods were produced may be readily ascertained by an inspection of the outside of the package.

The power of Congress to require the labeling of goods moving in interstate commerce is too well established to require discussion. *Seven Cases* v. *United States,* 239 U. S. 510; *Weeks* v. *United States,* 245 U. S. 618. Cf. *United States* v. *Freeman,* 239 U. S. 117. Petitioner appears to admit that if Section 1 of the Act is a valid exercise of the powers of Congress no objection can be made to Section 2 (Pet. brief, pp. 54–56). No other conclusion is possible because the provisions of Section 2 are intended to aid in enforcement of Section 1 and they are reasonable and appropriate means to that end.[15] It should also be noted that quite apart from Section 1, Section 2 may be justified as a reasonable and appropriate exercise of the

[15] There are analogous provisions in the Lacey Act, c. 553, 31 Stat. 188. Section 4 of that Act provides that it shall be unlawful to ship animals and birds in interstate commerce without marking the package so that the name and address of the shipper, and the nature of the contents can readily be ascertained by examining the outside of the package. This section was obviously designed to aid in the enforcement of the provisions of Sections 3 and 5 of that Act. In *Rupert* v. *United States*, 181 Fed. 87 (C. C. A. 8, 1910) the court said of Section 4 (p. 91):

> And to aid in the detection of such crimes, Congress had the authority to provide that all such interstate shipments should be plainly marked so that any person by a casual inspection would know the contents of the package.

commerce power designed to prevent the use of the instrumentalities of interstate commerce for the purpose of violating such state statutes as the Ohio statute which was upheld in *Whitfield* v. *Ohio,* 297 U. S. 431.

So far as the question of due process of law is concerned, the considerations which have been discussed above in connection with constitutionality of Section 1 are decisive of the constitutionality of Section 2. In its brief, petitioner does not attempt to contend that the labelling requirement, considered by itself, is so expensive or so arbitrary and burdensome as to be unreasonable. It is true that Section 2 requires all packages containing goods made by convict labor to be labelled, regardless of the law of the state of their destination. There can be no objection to such a requirement. "It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." *Purity Extract Company* v. *Lynch,* 226 U. S. 192, 201. See *Rupert* v. *Caffey,* 251 U. S. 264, and *Everard Breweries* v. *Day,* 265 U. S. 545.

CONCLUSION

It is respectfully submitted that the decree of the Circuit Court of Appeals for the Sixth Circuit should be affirmed upon the ground that the

Ashurst-Sumners Act is a valid exercise of the powers of Congress.

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APPENDIX A

STATES WHICH FORBID THE SALE OF GOODS MADE BY CONVICT LABOR

Arizona: Revised Code of Arizona (Supp. 1936), §§ 5333a–5333f.

California:[1] Penal Code of California (1931), §§ 679a, 1586. General Laws of California (1931), §§ 8062, 8062a.

Colorado: Colorado Session Laws (1933), ch. 149.

Idaho: Idaho Session Laws (1933), ch. 216.

Illinois: Revised Statutes of Illinois (1935), ch. 108, §§ 82, 90 (2).

Kansas:[1] Laws of Kansas (1935), ch. 291.

Louisiana: Acts of Louisiana (1936), ch. 169.

Massachusetts: Annotated Laws of Massachusetts (1933), ch. 127, §§ 67, 67A.

Michigan:[1] Compiled Laws of Michigan (Supp. 1935), § 17636–5.

Mississippi:[1 2] Laws of Mississippi (1934), ch. 147, § 1; ch. 296.

Montana: Revised Code of Montana (1935), § 11573.1.

Nebraska:[1] Laws of Nebraska (1935) ch. 183, §§ 10–11.

New Hampshire: Laws of New Hampshire (1933), ch. 42.

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[1] In these States there are certain exceptions to the general prohibitory provisions.

[2] The language of the Mississippi statutes is ambiguous but the legislative intent is clear.

New Jersey: Laws of New Jersey (1931), ch. 235.
New York: Laws of New York (1930), ch. 136. Laws of New York (1933), ch. 26.
North Carolina:[3] North Carolina Code (1935), § 4468a.
Ohio: Page's Code of Ohio (Supp. 1935), §§ 2228–1, 2228–2.
Oregon:[3] Laws of Oregon (1935), ch. 128.
Pennsylvania: Purdon's Pennsylvania Statutes (1930), Tit. 71, § 602 (c). Purdon's Pennsylvania Statutes (Supp. 1935), Tit. 61, § 257. (*See* Purdon's Pennsylvania Statutes (1930), Tit. 61, §§ 251–254.)
Rhode Island: Laws of Rhode Island (Jan. Sess., 1934), ch. 2106, § 3.
Texas: Vernon's Texas Statutes (1936), Penal Code, Art. 1137i.
Utah: Laws of Utah (1933), ch. 67, 68.
Virginia:[3] Virginia Code (1936), §§ 2073a, 2073b, 5009b.
Washington: Acts of Washington (1933), ch. 178.

STATES WHICH DO NOT PROHIBIT THE SALE OF GOODS MADE BY CONVICT LABOR BUT WHICH REQUIRE THE GOODS TO BE LABELLED

Georgia:[4] Laws of Georgia (Spec. Sess. 1931), p. 90.
Indiana:[5] Burns' Indiana Statutes, Annotated (1933), §§ 42–601 to 42–612.

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[3] In these States there are certain exceptions to the general prohibitory provisions.
[4] There is a special sales tax of 15% applicable to exchanges of prison-made goods.
[5] Dealers who handle prison products must secure a special state license.

Iowa: Acts of Iowa (1933), ch. 50, § 1.
Maine:[6] Revised Statutes of Maine (1930), ch. 152, §§ 14, 24, 39. Laws of Maine (1931), ch. 221. Laws of Maine (1933), ch. 1, §§ 331, 338.
Minnesota: Code of Minnesota (1936), § 3976.
New Mexico: New Mexico Statutes (1929), §§ 130–176, 130–177.
South Dakota: Acts of South Dakota (1933), ch. 158. Acts of South Dakota (1935), ch. 170.
Wisconsin: Laws of Wisconsin (1935), ch. 178.

[6] The statute is applicable only to goods produced in the Maine State Prison.

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SUPREME COURT OF THE UNITED STATES.

No. 138.—October Term, 1936.

Kentucky Whip and Collar Company, Petitioner, *vs.* Illinois Central Railroad Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 4, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This controversy relates to the constitutional validity of the Act of Congress of July 24, 1935, known as the Ashurst-Sumners Act. 49 Stat. 494.

The Act makes it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor into any State where the goods are intended to be received, possessed, sold, or used in violation of its laws. Goods made by convicts on parole or probation, or made in federal penal and correctional institutions for use by the Federal Government, are excepted. Packages containing convict-made goods must be plainly labeled so as to show the names and addresses of shipper and consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced.[1] Violation is punished by fine and forfeiture.[2]

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[1] Sections 1 and 2 are as follows:

"That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

"Sec. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except

Petitioner manufactures in Kentucky, with convict labor, horse collars, harness and strap goods which it markets in various States. It tendered to respondent, a common carrier, twenty-five separate shipments for transportation in interstate commerce, of which ten were consigned to customers in States whose laws prohibited the sale of convict-made goods within their respective borders, five to States whose laws did not prohibit such sale but required that the goods should be plainly marked so as to show that they were made by convicts, and the remaining ten to States whose laws imposed no restriction upon sale or possession. None of the packages were labeled as required by the Act of Congress and, in obedience to the Act, respondent refused to accept the shipments.

Petitioner then brought this suit for a mandatory injunction to compel the transportation. The District Court dismissed the bill and the Circuit Court of Appeals affirmed the decree. The District Court declared the Act to be invalid so far as it prohibited transportation of convict-made goods into States which proscribed sale or possession, but sustained the provision which required labeling. 12 Fed. Supp. 37. The Circuit Court of Appeals sustained the Act in its entirety. 84 F. (2d) 168. This Court granted certiorari. October 12, 1936.

Petitioner contends (1) that the Congress is without constitutional authority to prohibit the movement in interstate commerce of useful and harmless articles made by convict labor and (2) that the Congress has no power to exclude from interstate commerce convict-made goods which are not labeled as such.

First.—The commerce clause (Art. I, sec. 8, par. 3) confers upon the Congress "the power to regulate, that is, to prescribe the rule by which commerce is to be governed". This power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution". *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. By the Act now before us, the Congress purports to establish a rule governing interstate trans-

convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package".

[2] *Id.*, sections 3 and 4.

portation, which is unquestionably interstate commerce. The question is whether this rule goes beyond the authority to "regulate".

Petitioner's argument necessarily recognizes that in certain circumstances an absolute prohibition of interstate transportation is constitutional regulation. The power to prohibit interstate transporation has been upheld by this Court in relation to diseased livestock,[3] lottery tickets,[4] commodities owned by the interstate carrier transporting them, except such as may be required in the conduct of its business as a common carrier,[5] adulterated and misbranded articles, under the Pure Food and Drugs Act,[6] women, for immoral purposes,[7] intoxicating liquors,[8] diseased plants,[9] stolen motor vehicles,[10] and kidnaped persons.[11]

The decisions sustaining this variety of statutes disclose the principles deemed to be applicable. We have frequently said that in the exercise of its control over interstate commerce, the means employed by the Congress may have the quality of police regulations. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 215; *Hoke* v. *United States,* 227 U. S. 308, 323; *Seven Cases* v. *United States,* 239 U. S. 510, 515. The power was defined in broad terms in *Brooks* v. *United States,* 267 U. S. 432, 436, 437: "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In

[3] Act of May 29, 1884, 23 Stat. 31; Reid *v.* Colorado, 187 U. S. 118. See Champion *v.* Ames, 188 U. S. 321, 358, 359.

[4] Act of March 2, 1895, 28 Stat. 963; Champion *v.* Ames, 188 U. S. 321.

[5] Act of June 29, 1906, 34 Stat. 584; United States *v.* Delaware & Hudson Co., 213 U. S. 366, 415.

[6] Act of June 30, 1906, 34 Stat. 768; Hipolite Egg Co. *v.* United States, 220 U. S. 45; Seven Cases *v.* United States, 239 U. S. 510.

[7] Act of June 25, 1910, 36 Stat. 825; Hoke *v.* United States, 227 U. S. 308; Caminetti *v.* United States, 242 U. S. 470.

[8] Act of March 1, 1913, 37 Stat. 699; Act of March 3, 1917, 39 Stat. 1069; Clark Distilling Co. *v.* Western Maryland Rwy. Co., 242 U. S. 311; United States *v.* Hill, 248 U. S. 420; McCormick & Co. *v.* Brown, 286 U. S. 131.

[9] Act of March 4, 1917, 39 Stat. 1165; Oregon-Washington R. & N. Co. *v.* Washington, 270 U. S. 87.

[10] Act of October 29, 1919, 41 Stat. 324; Brooks *v.* United States, 267 U. S. 432.

[11] Act of June 22, 1932, 47 Stat. 326; Act of May 18, 1934, 48 Stat. 781; Gooch *v.* United States, 297 U. S. 124.

See, also, Act of May 25, 1900, 31 Stat. 187; Rupert *v.* United States, 181 Fed. 87; Act of July 3, 1918, 40 Stat. 755; Bogle *v.* White, 61 F. (2d) 930.

doing this it is merely exercising the police power for the benefit of the public, within the field of interstate commerce".

The anticipated evil or harm may proceed from something inherent in the subject of transportation as in the case of diseased or noxious articles, which are unfit for commerce. *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Oregon-Washington R. & N. Co.* v. *Washington,* 270 U. S. 87, 99. Or the evil may lie in the purpose of the transportation, as in the case of lottery tickets, or the transportation of women for immoral purposes. *Champion* v. *Ames,* 188 U. S. 321, 358; *Hoke* v. *United States, supra; Caminetti* v. *United States,* 242 U. S. 470, 486. The prohibition may be designed to give effect to the policies of the Congress in relation to the instrumentalities of interstate commerce, as in the case of commodities owned by interstate carriers. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 415. And, while the power to regulate interstate commerce resides in the Congress, which must determine its own policy, the Congress may shape that policy in the light of the fact that the transportation in interstate commerce, if permitted, would aid in the frustration of valid state laws for the protection of persons and property. *Brooks* v. *United States, supra; Gooch* v. *United States,* 297 U. S. 124.

The contention is inadmissible that the Act of Congress is invalid merely because the horse collars and harness which petitioner manufactures and sells are useful and harmless articles. The motor vehicles, which are the subject of the transportation prohibited in the National Motor Vehicle Theft Act,[12] are in themselves useful and proper subjects of commerce, but their transportation by one who knows they have been stolen is "a gross misuse of interstate commerce" and the Congress may properly punish it "because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions". *Brooks* v. *United States, supra,* p. 439. Similarly, the object of the Federal Kidnaping Act[13] is to aid in the protection of the personal liberty of one who has been unlawfully seized or carried away. *Gooch* v. *United States, supra;* compare *United States* v. *Wheeler,* 254 U. S. 281.

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[12] See Note 10.
[13] See Note 11.

On the same general principle, the Congress may prevent interstate transportation from being used to bring into a State articles the traffic in which the State has constitutional authority to forbid, and has forbidden, in its internal commerce. In that view, we sustained the acts of Congress designed to prevent the use of interstate transportation to hamper the execution of state policy with respect to traffic in intoxicating liquors. This was not because intoxicating liquors were not otherwise legitimate articles of commerce. On the contrary they were recognized as such "by the usages of the commercial world, the laws of Congress and the decisions of courts". *Leisy* v. *Hardin*, 135 U. S. 100, 110; *In re Rahrer*, 140 U. S. 545, 556; *Louisville & Nashville R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 82. It was because intoxicating liquors were legitimate subjects of commercial intercourse that the States were powerless to interfere with their transportation in interstate commerce. *Bowman* v. *Chicago & Northwestern Rwy. Co.*, 125 U. S. 465, 489; *Leisy* v. *Hardin, supra*, pp. 110, 113; *Rhodes* v. *Iowa*, 170 U. S. 412; *Vance* v. *W. A. Vandercook Co.* (No. 1), 170 U. S. 438; *Louisville & Nashville R. Co.* v. *Cook Brewing Co., supra.* But because of the effects ascribed to the traffic in intoxicating liquors, the States in the exercise of their police power in relation to their internal commerce could restrict or interdict that traffic without violating the Federal Constitution. *Foster* v. *Kansas*, 112 U. S. 201, 206; *Mugler* v. *Kansas*, 123 U. S. 623, 657-659. To aid the States in securing the full protection they desired, Congress brought into play its power to regulate interstate commerce.

By the Wilson Act of August 8, 1890,[14] intoxicating liquors transported into any State were subjected upon arrival to the operation of state laws to the same extent as though they had been produced within the State, although still in the original packages. This act was upheld in *In re Rahrer, supra.* But the statute did not apply until the transportation was completed by actual delivery to the consignee. *Rhodes* v. *Iowa, supra*, p. 426; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218, 222; *Louisville & Nashville R. Co.* v. *Cook Brewing Co., supra.* As "the right to receive" was not affected by the Wilson Act, "such receipt and the possession following from it and the resulting right to use" remained protected by the commerce clause. *Clark Distilling Co.* v. *Western Maryland*

[14] 26 Stat. 313.

Rwy. Co., 242 U. S. 311, 323. In this situation the Congress passed the Webb-Kenyon Act of March 1, 1913,[15] which prohibited the transportation of intoxicating liquors into any State when it was intended that they should be "received, possessed, sold, or in any manner used," in violation of its laws. The Court upheld the constitutional validity of this Act as a regulation of interstate commerce. *Clark Distilling Co.* v. *Western Maryland Rwy. Co., supra.* It was supplemented by the Act of March 3, 1917, known as the Reed Amendment.[16] *United States* v. *Hill,* 248 U. S. 420, 424.

The ruling in *Hammer* v. *Dagenhart,* 247 U. S. 251, upon which petitioner relies, in no way contravenes or limits the principle of these decisions. In the *Hammer* case, the Court concluded that the Act of Congress there under consideration had as its aim the placing of local production under federal control. *Id.*, pp. 271, 272. Far from disapproving the decisions we have cited, the Court expressly recognized their authority. "In each of these instances", the Court said, "the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended". *Id.* And within a few months after the *Hammer* case, the Court in *United States* v. *Hill, supra,* emphatically reiterated the doctrine of these cases and, in particular, that of *Clark Distilling Co.* v. *Western Maryland Rwy. Co.*, sustaining the Webb-Kenyon Act.

The course of congressional legislation with respect to convict-made goods has followed closely the precedents as to intoxicating liquors. By the Hawes-Cooper Act of January 19, 1929,[17] the Congress provided that convict-made goods (with certain exceptions) transported into any State should be subject upon arrival, whether in the original packages or otherwise, to the operation of state laws as if produced within the State. In *Whitfield* v. *Ohio,* 297 U. S. 431, petitioner was charged in the state court in Ohio with selling convict-made goods in violation of the state law. It appeared that the goods had been sold in the original packages and shipped in interstate commerce and that there was "nothing harm

[15] 37 Stat. 699.
[16] 39 Stat. 1069.
[17] 45 Stat. 1084.

ful, injurious or deleterious'' about them. But this Court said that the view of the State of Ohio, that the sale of convict-made goods in competition with the products of free labor was an evil, found ample support in fact and in the similar legislation of a preponderant number of other States. The Court observed that the Congress had prohibited the importation of the products of convict labor.[18] All such legislation, state and federal, proceeded upon the view ''that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison''. The Court upheld the power of the State, so far as the Federal Constitution is concerned, to base non-discriminatory legislation upon that conception, and as it appeared that the Ohio statute would be unassailable if made to take effect after sale in the original package, the statute was held to be equally unassailable in the light of the provisions of the Hawes-Cooper Act. As to the validity of the latter Act, the Court followed the decision in *In re Rahrer, supra,* in relation to the Wilson Act.

The Ashurst-Sumners Act as to interstate transportation of convict-made goods has substantially the same provisions as the Webb-Kenyon Act as to intoxicating liquors and finds support in similar considerations. The subject of the prohibited traffic is different, the effects of the traffic are different, but the underlying principle is the same. The pertinent point is that where the subject of commerce is one as to which the power of the State may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy.

In the congressional action there is nothing arbitrary or capricious bringing the statute into collision with the requirements of due process of law. The Congress in exercising the power confided to it by the Constitution is as free as the States to recognize the fundamental interests of free labor.[19] Nor has the Congress

[18] Act of June 17, 1930, 46 Stat. 689.

[19] In the report of the Committee on the Judiciary of the Senate, recommending the passage of the Ashurst-Sumners Act, the Committee said (Sen. Rep. No. 906, 74th Cong., 1st sess.):

''For many years the Congress has considered bills relating to the sale of prison-made goods. Extensive hearings have been held on these measures which have thoroughly revealed the evils attending the sale of such goods, in

attempted to delegate its authority to the States. The Congress has not sought to exercise a power not granted or to usurp the police powers of the States. It has not acted on any assumption of a power enlarged by virtue of state action. The Congress has exercised its plenary power which is subject to no limitation other than that which is found in the Constitution itself. The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection.

Second.—As the Congress could prohibit the interstate transportation of convict-made goods as provided in section one of the Act, the Congress could require packages containing convict-made goods to be labeled as required by section two. The requirement of labels, disclosing the nature of the contents, the name and location of the penal institution where the goods were produced, and the names and addresses of shippers and consignees, was manifestly reasonable and appropriate for the carrying out of the prohibition. *Seven Cases* v. *United States, supra; Freeman* v. *United States,* 239 U. S. 117; *Weeks* v. *United States,* 245 U. S. 618, 622. The fact that the labeling was required in all shipments of convict-made goods, regardless of the law of the State of destination, does not invalidate the provision as its scope could reasonably be deemed to be necessary to accomplish the legitimate purpose of the Act. *Otis* v. *Parker,* 187 U. S. 606, 609; *New York ex rel. Silz* v. *Hesterberg,* 211 U. S. 31, 40; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560.

The decree is affirmed.

Affirmed.

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the open market, in competition with goods manufactured and produced by free labor. These evils impelled the Congress in 1929 to enact the Hawes-Cooper law, by virtue of which prison-made goods, upon their entry and delivery into a State, became subject to the laws of that State.

"At present 21 States, with a population in excess of 75 millions, have enacted laws prohibiting the sale, in the open market, of prison-made goods. This bill is designed to prohibit the transportation of such goods into the States which have thus legislated, in cases in which such goods are to be received or used in violation of the State law. The principle involved in this bill has been frequently sustained by the Supreme Court of the United States".